111-148

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 262.

GEORGE COOPER AND CASSIUS M. CLARK, PLAINTIFFS IN ERROR,

vs.

BARTHOLD SCHLESINGER, THEODORE DRIER, AND SEBASTIAN B. SCHLESINGER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

FILED JULY 15, 1881.

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IN THE SUPREME COURT

OF THE UNITED STATES.

GEORGE COOPER Et Al., Plaintiffs in Error,

VS.

BARTHOLD SCHLESINGER Et Al., Defendants in Error.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DIVISION OF THE NORTHERN DISTRICT OF OHIO.

TRANSCRIPT OF RECORD.

CITATION.

THE UNITED STATES OF AMERICA.

To

BARTHOLD SCHLESINGER,
THEODORE DRIER AND
SEBASTIAN B. SCHLESINGER.

Greeting:

You are hereby cited and admonished to be and appear

at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error, filed in the Clerk's office of the Circuit Court of the United States for the Eastern Division Northern District of Ohio.

Wherein

GEO. COOPER AND
CASSIUS M. CLARK

are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS: The honorable Martin Welker, District Judge of the United States for Northern District of Ohio, holding Circuit Court this 23d day of May, in the year of our Lord, one thousand eight hundred and eighty-one.

M. WELKER,
District Judge sitting in Circuit Court.

On this 24th day of May, in the year of our Lord, one thousand eight hundred and eighty-one, the undersigned, B. Schlesinger and others, plaintiffs in the original action sought to be reviewed herein on error, hereby acknowledge the service of notice of the within citation by a true copy thereof to them delivered.

B. SCHLESINGER ET AL.
By TERRILL, BEACH & CUSHING,
Their Attorneys.

MAY 24, A. D. 1881.

Geo. Cooper et al., Plaintiffs, vs. B. Schlesinger et al., Defendants.

UNITED STATES OF AMERICA, SS.:

THE PRESIDENT OF THE UNITED STATES.

To the Honorable the Judges of the Circuit Court of the United States for the Northern District of Ohio—Eastern Division.

Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, between

BORTHOLD SCHLESINGER, THEODORE DREIER AND SEBASTIAN B. SCHLESINGER, as plaintiffs,

AND

GEORGE COOPER AND CASSIUS M. CLARK, as defendants,

a manifest error hath happened, to the great damage of the said

GEORGE COOPER AND CASSIUS M. CLARK, defendants,

as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the *Supreme Court of the United States*, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein

to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS: The Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 23d day of May, in the year of our Lord, one thousand eight hundred and eighty-one.

[SEAL.] AUGUSTUS J. RICKS,

Allowed by *Clerk of the Circuit Court of the United States. N. D. O.*

RETURN ON WRIT OF ERROR.

THE UNITED STATES OF AMERICA,

NORTHERN DISTRICT OF OHIO, SS.:

I, Augustus J. Ricks, Clerk of the United States Circuit Court within and for said District, do hereby certify that in obedience to the command of the within writ of error the court has duly searched the record and proceedings of the said court in the cause aforesaid, and now herewith transmit to the Supreme Court of the United States, a full and complete transcript thereof.

In witness whereof I have hereunto set my hand and affixed the seal of said Circuit Court at office in the City of Cleveland this 3d day of June, A. D. 1881.

[SEAL.] AUGUSTUS J. RICKS,

Clerk.

Geo. Cooper et al., Plaintiffs, vs. B. Schlesinger et al., Defendants.

PETITION.

FOR MONEY ONLY.

In the Circuit Court of the United States, Northern District of Ohio.

BARTHOLD SCHLESINGER, THEODORE DREIER and SEBASTIAN B. SCHLESINGER, *Plaintiffs*,
vs.
GEORGE COOPER and CASSIUS M. CLARK, *Defendants*.
} PETITION.

The plaintiffs say: That they are not citizens of the State of Ohio, but said Barthold Schlesinger and said Theodore Dreier are citizens of the State of Massachusetts, and said Sebastian B. Schlesinger is a citizen of the State of New York.

That said defendants are citizens of the State of Ohio, and residents in said Northern District of Ohio. That on and continuously since the first day of March, A. D. 1877, the plaintiffs have been partners doing business under the firm name of Naylor & Company, and that on and continuously since said first day of March, A. D. 1877, the defendants have been partners doing business under the firm name of George Cooper & Company.

That the plaintiffs' cause of action is founded upon an account, of which the following is a copy, together *with all credits*:

"Messrs. Geo. Cooper & Co., Cleveland, Ohio, bought of Naylor & Company 13 bundles 1x8 Norway clip iron, 1,265 lbs.

Price (gold, $1.12½)	$ 63.53
Premium on gold at 5⅛ per cent	3.26
28 bundles 1¼ by 4, 4,586 lbs.	
28 " 1⅜ by 3, 4,570 "	
56 bundles star spring steel, 9,156 lbs.	
Price, 5½c. Sixty days	503 58
Cartage	4.65
	$575 02

CREDIT.

Allowance on clip iron, $7½ per ton and 5½ per cent	4.46
	$570 56

MARCH 5th, 1877

Plaintiffs say that there are no other credits or endorsement on said account, and that there is due them on said account from defendants the sum of five hundred and seventy dollars and fifty-six cents, with interest from the fifth day of March, A. D. 1877, for which they ask judgment.

By BOLTON AND TERRILL,
Plaintiffs' Attorneys.

STATE OF OHIO,
Cuyahoga County, ss.

Herbert L. Terrill, being first duly sworn, says that he is the attorney of the plaintiffs in the above entitled action; that said plaintiffs are non-residents of, and are absent from said county, and that the allegations of the foregoing petition are true, as he verily believes.

H. L. TERRILL.

Subscribed in my presence by said Herbert L. Terrill, and by him sworn to before me, this 14th day of January, 1879.

[SEAL.] WM. E. CUSHING,
Notary Public in and for said County.

Tax fees, 40c.

PETITION FOR MONEY ONLY.

UNITED STATES CIRCUIT COURT,
Northern District of Ohio.

BARTHOLD SCHLESINGER, THEODORE DREIER and SEBASTIAN B. SCHLESINGER, *Plaintiffs*,
vs.
GEORGE COOPER and CASSIUS M. CLARK, *Defendants.*
} PRECIPE.

To the Clerk: Issue summons in the above entitled action, returnable according to law. Indorse thereon petition for money only. Amount claimed, $570.56, with interest from March 5th, 1877.

BOLTON AND TERRILL,
Plaintiffs' Attorneys.

Filed January 17th, 1879.

SUMMONS.

THE UNITED STATES OF AMERICA.

NORTHERN DISTRICT OF OHIO, SS.

The President of the United States of America to the Marshal of the Northern District of Ohio.

Greeting:

You are hereby commanded to notify George Cooper and Cassius M. Clark that they have been sued by Barthold Schlesinger, Theodore Dreier and Sebastian B. Schlesinger in the Circuit Court of the United States, within and for said district, and that unless they answer by the 15th day of February, A. D. 1879, the petition of the said plaintiffs against them filed in the Clerk's office of said court, at Cleveland, in said district, such petition will be taken as true, and judgment will be rendered accordingly. You will make due return of this summons on the 27th day of January, A. D. 1879.

WITNESS: The Honorable Morrison R. Waite, Chief Justice of the United States, this 17th day of January, A. D. 1879, and in the 103d year of the Independence of the United States of America.

[SEAL.] A. J. RICKS, *Clerk.*

By E. W. PAGE, *Deputy Clerk.*

NORTHERN DISTRICT OF OHIO, SS.

On the 18th day of January, A. D. 1879, I delivered a true and duly certified copy of this writ to each of the

within named George Cooper and Cassius M. Clark, at Cleveland, Cuyahoga County.

Service, $4.00
Copy, 1.00
Travel, 50

$5.50

N. B. PRENTICE,
U. S. Marshal.
By C. A. PRENTICE,
Deputy.

H. L. Terrill has acknowledged himself security for all costs for which the plaintiff may be liable in this suit.

Indorsed.

Returnable January 27th, 1879.

Rule for answer, February 15th, 1879.

Returned and filed, January 18th, 1879.

A. J. RICKS, *Clerk.*

And afterwards, to-wit: on the 24th day of March, A. D. 1879, being a day of the January term of said court, the following proceedings were had in this cause:

LEAVE TO ANSWER.

BARTHOLD SCHLESINGER ET AL., vs. GEORGE COOPER ET AL. } LEAVE TO ANSWER.

In this cause leave is given the defendants to file their answer in ten (10) days.

ANSWER.

IN THE CIRCUIT COURT OF THE UNITED STATES.

NORTHERN DISTRICT OF OHIO—EASTERN DIVISION.

BARTHOLD SCHLESINGER ET AL.,
Plaintiffs.
vs.
GEORGE COOPER ET AL.,
Defendants.
} ANSWER.

Now come said George Cooper and Cassius M. Clark, defendants, and for answer to the petition of the plaintiffs herein by way of defense, counter claim and set off, say that the Star Spring Steel mentioned in said petition was delivered to defendants under and by virtue of the terms and provisions of a contract between said plaintiffs and said defendants, made on or about the 7th day of March, A. D. 1876, whereby said plaintiffs promised and agreed to sell and deliver to defendants three hundred tons of said steel at and for the price of 5¾ cents per pound, and said defendants agreed to purchase and pay for the same at the price aforesaid, the same to be delivered on defendant's order at various times in the future.

Defendants further say that said plaintiffs then, and for a long time prior thereto, had been engaged in operating furnaces and manufacturing steel, and defendants then and for a long time theretofore, had been engaged in manufacturing steel carriage springs at Cleveland, Ohio, and using therein large quantities of spring steel; that for a long time defendants had been using therein the steel manufactured by plaintiffs and known as Star Spring Steel, and that a change from the use of one quality of steel to

the use of another, or from the use of steel of one manufacture to the use of steel of another manufacture in defendants said business, involved a large expense and much delay and inconvenience, and that defendants could not compete with others in the same business unless they could purchase said steel at as low a price as the same could be purchased by others in such business; defendants further say that all of the premises were well known to said plaintiffs at the time when said contract and agreement was made, and said contract was made with reference thereto; defendants further say that in order to induce them to enter into said contract, and to induce them to purchase said 300 tons of steel, said plaintiffs, by their agent, falsely and fraudulently represented to defendants that the condition of their furnaces and business was such that they could not manufacture or sell during the year 1878 exclusively of the amounts already ordered by plaintiffs' customers more than 600 tons of Star Spring Steel, including the 300 tons which they then requested defendants to purchase, and such that they could not manufacture or sell during the year 1876, exclusively of the amounts already ordered by plaintiffs' customers, more than 300 tons of Star Spring Steel to makers of carriage springs, to-wit: The 300 tons which they then requested defendants to purchase, and which they then did agree to purchase as aforesaid; and defendants further say that it was a part of the agreement and contract aforesaid, and said plaintiffs then and there promised and agreed with defendants that they would not manufacture and sell during the year 1876, exclusively of the amount already ordered by plain-

tiffs' customers, more than 600 tons of said steel, including the amount so contracted to be sold to said defendants, and would not manufacture and sell during the year 1876, exclusively of the amounts already ordered by plaintiffs' customers, any Star Spring Steel whatever to makers of carriage springs.

Defendants further say that each and all of said representations were false, fraudulent and untrue, and that said plaintiffs and said agent made the same knowing them to be false, fraudulent and untrue, and for the purpose and with the intent of inducing these defendants to make the contract aforesaid and purchase said 300 tons of steel at a price in excess of the then and future market price of spring steel, and of said Star Spring Steel, and these defendants say that they believed and relied upon said representations and entered into said contract, and agreed to purchase said steel, believing and relying upon each and all of said representations.

Defendants further say that said price was in excess of the then price of spring steel, and of said star spring steel, and so continued to be during the whole of the delivery of the steel hereinafter mentioned; and that, in fact, the condition of said plaintiffs' furnaces and business was not in any respect as represented as aforesaid, but as plaintiffs and said agent well knew the condition of said plaintiffs' furnaces and business was such that they could manufacture and sell very large quantities of Star Spring Steel during said year 1876 in addition to said 600 tons, and said amounts so ordered as aforesaid, and could manufacture and sell to makers of carriage springs large quan-

tities of said star spring steel in addition to said 300 tons and said amounts so ordered as aforesaid during said year 1876; and said defendants say that during the said year 1876 said plaintiffs did manufacture and sell large quantities of said Star Spring Steel, in addition to said 600 tons, and said amounts so ordered as aforesaid, and did manufacture and sell large quantities of said Star Spring Steel to makers of carriage springs, in addition to said 300 tons, and said amounts so ordered as aforesaid, but to what amount the same was manufactured and sold, and to whom the same was sold, defendants are not advised and cannot state.

Defendants further say that during the year 1876 said plaintiffs delivered to defendants, under said contract and at various times, 572,900 pounds of said Star Spring Steel, for all of which said defendants paid plaintiffs at the price of $5\frac{3}{8}$ cents per pound, as provided for in said contract, and said plaintiffs also delivered to defendants the 9,156 pounds mentioned in the petition for which defendants have not paid.

Defendants further say that by reason of the manufacture and sale to other persons, and to other makers of carriage springs, of large quantities of said Star Spring Steel, the market price of the same, and of carriage springs, was largely decreased, and during said year 1876 said defendants were compelled to, and did pay for all the steel delivered to them under said contract as aforesaid, a price greater than the market price, and a price greater than the said steel was sold for by plaintiffs to others, and to other makers of carriage springs, and defendants were unable to compete with other makers of car-

riage springs, to the damage of defendants in the sum of six thousand dollars; defendants further say that they did not learn the true condition of plaintiffs' furnaces or business, or of the sales aforesaid to other persons, and to other makers of carriage springs, until after the delivery of the steel mentioned in petition, and that these defendants refused to receive any further or other steel under said contract.

Defendants therefore pray that they may be allowed as counter claim, and set off to whatever claim plaintiffs have against defendants so much of said $6,000.00 as equals the same, and that they may have judgment against said plaintiffs for balance of said $6,000.00.

By INGERSOLL & WILLIAMSON,
Defendants' Attorneys.

STATE OF OHIO,
Cuyahoga County. ss.

George Cooper, being first duly sworn, says that he is one of the firm of George Cooper & Co., and one of the defendants in the above entitled case, and that the st tements in the foregoing answer are true, as he verily believes.

GEORGE COOPER.

Sworn to before me by the said George Cooper, and by him subscribed in my presence, this 29th day of March, A. D. 1879.

W. B. BOLTON,
Notary Public.

Tax fees, 40c.
Filed March 29th, 1879.

Geo. Cooper et al., Plaintiffs, vs. B. Schlesinger et al., Defendants.

CONTINUANCE.

And afterwards, to-wit: At the January Term of said court, A. D. 1879, this cause was continued to the next Term of said court.

And afterwards, to-wit: At the April Term of said court, A. D. 1879, this cause was continued to the next Term of said court.

And afterwards, to-wit: At the October Term of said court, A. D. 1879, this cause was continued to the next Term of said court.

REPLICATION.

THE CIRCUIT COURT OF THE UNITED STATES,

FOR THE NORTHERN DISTRICT OF OHIO.

BARTHOLD SCHLESINGER ET AL.,
vs.
GEORGE COOPER ET AL. } REPLY.

And now comes said plaintiffs, and for reply and answer to the answer and counter claim of defendants say:

That they admit that said steel was sold under a contract, and that they are steel producers, and that defendants steel consumers, and that defendants have had and used their steel without paying therefor; and they deny each and every other allegation in said answer and counter-claim.

H. L. TERRILL,
C. B. BEACH,
Attorneys for Plaintiffs.

NORTHERN DISTRICT OF OHIO.

Personally appeared before me H. L. Terrill, one of the attorneys for plaintiffs, who are non-residents of this State, and made oath that the denials and allegations of the foregoing reply and answer are true, as he believes.

E. W. PAGE,
U. S. Com'r., N. D. O.

Filed February 11th, 1880.

JURY EMPANELED.

And afterwards, to-wit: on Thursday, the 12th day of February, being a day of the January Term of said court, A. D. 1880, the following proceedings were had in this cause:

BARTHOLD SCHLESINGER ET AL.,
vs.
GEORGE COOPER ET AL.

This day came the parties, by their respective attorneys, and thereupon, a jury being called, come, to-wit: H. L. Miller, C. F. Sangster, John D. Ross, Myron C. Hills, Nicholas Sheffield, R. C. Taggart, John Reid, M. W. Wright, H. D. Merriman, Geo. F. Ball, W. H. Owens and Elihu Fish, who, being accepted, were empanelled and sworn, and affirmed to well and truly try the issues joined between the parties at bar, and said jury, after hearing the testimony and arguments of counsel, and receiving the charge of the Court, retired, in charge of the Marshal, for deliberation.

Geo. Cooper et al., Plaintiffs, vs. B. Schlesinger et al., Defendants.

VERDICT.

And afterwards, to-wit: On Friday, the 13th day of February, being a day of the January Term of said Court, A. D. 1880, the following proceedings were had in this cause:

BARTHOLD SCHLESINGER ET AL.,
vs.
GEORGE COOPER ET AL.

This day came again the parties, by their respective attorneys, and also the jury heretofore empanelled and sworn, and affirmed herein, and said jury for verdict say: "We, the jury in this case, being duly empanelled and sworn, do find for the plaintiffs, and assess their damages to the sum of six hundred and sixty-seven and 27-100 dollars.

R. C. TAGGART,
Foreman.

Whereupon comes the defendants, by their attorneys, and file their motion for a new trial herein.

MOTION FOR NEW TRIAL.

IN THE CIRCUIT COURT OF THE UNITED STATES.

FOR THE NORTHERN DISTRICT OF OHIO—EASTERN DIVISION.

B. SCHLESINGER ET AL.,
Plaintiffs,
vs.
GEORGE COOPER ET AL.
Defendants.
} MOTION FOR NEW TRIAL.

Now come the defendants in this action and move the

Court to set aside the verdict herein, and for a new trial of this cause, for the following reasons, to-wit:

1st. That said verdict is against the evidence, and is not sustained by sufficient evidence.

2d. That the Court erred in its charge and instructions to the jury on the trial of said cause.

3d. That said verdict is contrary to the law of the case.

By INGERSOLL & WILLIAMSON,
Defendants' Attorneys.

Filed February 13th, 1880.

Afterwards, to-wit: On the 5th day of April, A. D. 1880, being a day in the January Term, A. D. 1880, of said court, came the defendants, by their attorneys, and duly filed in said court their certain bill of exceptions, taken at the trial of this cause, which bill of exceptions is in the words and figures following, to-wit:

BILL OF EXCEPTIONS

IN THE CIRCUIT COURT OF THE UNITED STATES.

FOR THE NORTHERN DISTRICT OF OHIO—EASTERN DIVISION.

BARTHOLD SCHLESINGER ET AL., *Plaintiffs*, vs. GEORGE COOPER ET AL., *Defendants*.	BILL OF EXCEPTIONS.

Be it remembered, That on the trial of the above entitled cause, in the Circuit Court of the United States, for the Eastern Division of the Northern District of Ohio, at

the January Term thereof, A. D. 1880, held by Honorable Martin Welker, District Judge of said District, sitting alone, the defendants, to maintain the issue on their part, offered testimony as follows:

Present on behalf of complainants, H. L. Terrell.

Present on behalf of defendants, Messrs. Ingersoll & Williamson.

Defendants' counsel offered in evidence order of Cooper & Co., on Naylor & Co., for three hundred tons Star Spring Steel, at 5⅞ cents per lb., etc., a copy of which order is attached to the deposition of Henry P. Tallant, hereinafter set forth, marked exhibit "C," and made part of this bill of exceptions.

GEORGE COOPER, one of the defendants, being duly sworn, was examined in chief by Mr. Williamson and testified as follows:

Q. Mr. Cooper, you have been a resident of Cleveland for some time?

A. Yes, sir.

Q. What is your business?

A. I am a manufacturer of carriage springs.

Q. Do you carry on other business besides the manufacture of carriage springs?

A. Yes, sir. Hardware; carriage and saddlery hardware.

Q. Where is your store for the sale of hardware located?

A. My store is at 88 Superior street.

Q. That is at the foot of the street?

A. Foot of the street, yes, sir.

Q. On the other side of Superior street, is it?

A. Yes, sir.

Q. And where is your carriage spring factory located?

A. Located at the corner of Main and Center streets. Forest City Spring Works it is called. Corner of Main and Center streets.

Q. That is upon the other side of the river, is it?

A. Yes, sir.

Q. How long have you been engaged in the manufacture of carriage springs?

A. About ten years, sir. Yes, ten years.

Q. And here all the time?

A. I have been here ten years manufacturing carriage springs.

Q. In Cleveland?

A. In Cleveland. Yes, sir.

Q. How long have you known in a business way the house of Naylor & Co.?

A. Oh, seven or eight years, sir. Perhaps more; nine or ten years.

Q. How long have you been dealing with them?

A. I should say nine years, sir.

Q. What is their business?

A. I never was in their place of business. They manufacture steel, sir, and deal largely in Norway Iron.

Q. What kind of goods have you purchased of them during the last eight or nine years?

A. Principally steel, sir.

Q. To be used in your manufactory?

A. Yes, sir.

Q. I understand you, you do not know either of the members of the firm?

A. No, sir.

Q. You never met them?

A. No, sir.

Q. Whom have you met connected with that house?

A. Colonel Hoyt, principally, sir.

Q. That is this gentleman (indicating)?

Q. This gentleman, yes, sir.

Q. How long have you known Colonel Hoyt?

A. About eight years, I should say, sir.

Q. Have most of your purchases been made from him?

A. Yes, sir.

Q. When did you first buy a large quantity of steel from this house of Naylor & Co.?

A. It was in November, 1875, I made the first large purchase.

Q. How large an amount did you contract for at that time?

A. It was two hundred and forty tons, sir.

Q. From whom did you purchase that—that is—from what person?

A. I purchased from a person by the name of Hart, connected with Naylor, sir.

Q. That was not purchased of Colonel Hoyt?

A. No, sir.

Q. I will ask you whether you used that steel in your works from November on, or when did you commence to use it?

A. We commenced to use that probably the first of January, 1876; about that time.

Q. And what other steel, if any, did you use in connection with it after you commenced to use the Naylor & Co. steel, or did you use that entirely?

A. We used Naylor & Co's. steel during 1876, sir, entirely, I believe, as near as what I can remember.

Q. When did you first see Colonel Hoyt in reference to Naylor & Co.'s steel?

A. Oh, I have purchased small quantities of steel——

Q. I mean after November, 1875?

A. Colonel Hoyt called into my place of business about sometime in February, 1876, and I inquired——

Q. Go on, and state what conversation you had with him there.

MR. TERRELL. In reference to this steel?

MR. WILLIAMSON. In reference to using this steel.

MR. TERRELL. I object.

THE COURT. If that is relied upon as the representations that led to this contract, it ought to be permitted. It may throw some light on the subsequent contract. If it does not, of course it does not amount to anything.

(Objection overruled. Complainants except.)

A. In February, then, 1876, Colonel Hoyt called upon me and asked me how we liked the Star Steel. I told him that it was working to our entire satisfaction, and that we should use it that year.

Q. Use it when?

A. We should use it during the year—continue to use it during the year, providing the price was satisfactory. He remarked that he would see that the price was all right. That was all during that conversation. That was in Feb.

Q. By the Court. You stated to him that you desired to use it for the next year?

A. Yes, sir, if the price was satisfactory. He stated that he would see to it that the price was made right. On the 7th of March he called again to see me; told me he had something to say to me.

By Mr. Williamson. Wait a moment, Mr. Cooper. Where did he find you?

A. In my store, 88 Superior street.

Q. Was anybody else present when he first came in?

A. Mr. Clark was present, and some others, probably; I don't remember exactly.

Q. Now go right on.

A. On the 7th of March he came in and stated he had something to say to me. He said that he had but three hundred ton of steel to sell during that year.

Q. By the Court. Who said that?

A. Colonel Hoyt. He had but three hundred ton of steel to sell during 1876. "True," he says, "We have six hundred ton, but there is three hundred ton of that steel, that has got to be reserved for other business outside of spring makers; three hundred ton only can go into the hands of spring makers." I showed him that we didn't want any; that we had a contract with them already for steel that would run our factory until the first of July, but he remarked that "after that you will want the steel, and if you don't get it now, you can't get it at all—not a pound." He declined to entertain any idea of purchasing then. During the day he was in perhaps once or twice, but finally, about two o'clock, probably, he came in and

says, "I have got a telegraph dispatch. I am going to Canton. There is a party there that will close this steel for me at once. Now, if you want it there is a chance, and your only chance." Well, I then for the first time asked him the price. He says: "Five and three-fourths cents." And on contract was five and three-eights for what we had purchased from him before. I said to Colonel Hoyt, "If we entertain a thought of buying the steel, you will make it surely five and three-eighths?" "No, sir, I can get five and three fourths for it, and of course will not do anything of the kind, but this I will do, I will telegraph my house in Boston," he says, "and we will ask them to make a concession of one-eighth of a cent," making it five and five-eighths." That was a quarter of a cent more than we were paying them then. "And I will also add, Mr. Cooper," he said, "That I would prefer your account to the account at Canton—yours even at five and five-eighths—to theirs at five and three-quarters." Colonel Hoyt then went away and drew up that instrument that has just been read, and we signed it, and that is all there is to the purchase.

Q. In these conversations, did he give you any reason, if you remember, why they had no more on hand?

A. My memory is not clear on that, what they were going to do, or what was the reason why they would not have any more steel than this which he named. I can't exactly say—the reason why—I can't.

Q. Did he give you the reason, do you remember?

A. I think it is very likely he did, but I don't remember?

Q. Was it something connected with their business?

A. Yes, sir.

Q. Now, I don't know that you have any account of the number of pounds that you received during this year?

A. On that contract?

Q. Yes.

A. Yes, sir, I have the figures right here.

Q. If you have you may give them to the jury—as to when, and what amounts you received. I understand they were all paid for except this last bill?

A. All was paid that we received except the last. We received, then, on that contract—we bought the steel by the pound—five and five-eighths a pound—we received on that 564,145 pounds, for which we paid them in cash 31,587.97.

Q. That is at the rate of five and five-eighths, is it Mr. Cooper?

A. For 448,000 pounds at five and five-eighths, and 116,145 at five and a half.

Q. Now, have you the particular dates when you received this steel?

A. I have only the last shipment in November.

Q. Yes, that I understand.

A. In November, 1876, we got about half of it, I think more than half.

Q. When did you first learn that Naylor & Co. had sold more than the amount of steel they had spoken of—six hundred tons?

A. Never learned anything about it until a year afterwards, March, 1877.

Q. From whom did you learn it then?

A. From Colonel Hoyt himself.

Q. Who called his attention to it? Did you call his attention to it?

A. I, yes, sir; he was speaking about spring makers selling steel in 1876. I asked him if he sold other parties after March the 7th, 1876, and he said they did. I asked him how that came to pass?

Q. I will ask you when he stated these facts, with reference to the amount of steel they had at their disposal, whether or not you believed what he said to you?

A. Most assuredly; certainly; I supposed it to be just as he represented; certainly.

Q. I will ask you, if you know, what the state of the market was with reference to steel during that year; was there a rising or falling market?

A. Falling; falling market all the time.

Q. Mr. Cooper, what was it particularly that you relied upon as an inducement in going into this contract?

(Objected to. Objection sustained.)

Q. I will ask you, as a matter of fact, at that time in March, 1876, whether there was any reason for your preferring to use this Naylor & Co.'s steel, and if so, what it was?

A. The reason that I would assign for that was, that it was difficult to change it off from one make to another, and we preferred to use one make of steel if possible.

Q What was there particular about this steel, different from other steel?

A. The process of manufacturing this steel was different to these steels that are made now here.

Q. Was there any more difference than there is now?

A. No, I guess not. I think the Star Steel is not made —I think they don't make it now at all.

Q. What was the difference in the use of it in your works, if anything?

A. My foreman is here and I will let him explain that part of it, sir, as he would know, better, perhaps, than I.

Q. I will ask you whether there was any expense involved in changing from one kind of steel to another?

A. It is considered that there is.

(Question and answer objected to. Objection overruled.)

Q. And how? In what way?

A. I will allow my foreman to explain that, sir, if you please, as he could understand it better than I could.

CROSS-EXAMINATION BY MR. TERRELL.

Q. This contract was made on the 7th of March, 1876. When did they commence shipping under that contract, do you remember?

A. The first shipment was made in the last of June, or about the first of July, sir.

Q. And when was this bill in dispute shipped?

A. Shipped in, probably March, 1877.

Q. The next year?

A. Yes, sir.

Q. The shipments, then, covered from about the first of July, 1876, up to sometime in March, 1877, of these three hundred tons, or what of it you got?

A. Between November and the first of March we received nothing. In November we had very large shipments. *That* was the next after November. That four—— ton, whatever it is.

Q. Sometime, then, during the month of November you had large shipments?

A. Yes, sir.

Q. What time in November, do you remember?

A. Yes, sir, from the 16th to the 24th.

Q. Do you remember about how much from the 16th to the 24th?

A. I looked at the books only yesterday, or the day before; I think about a hundred and thirty odd tons.

Q. Then no more shipments until March of 1877?

A. No, sir.

Q. You paid for four hundred and odd tons of this steel that you got at five and five-eighths, I believe you say?

A. No, sir.

MR. INGERSOLL. Four hundred and forty-eight thousand pounds?

Q. Four hundred and forty-eight thousand pounds at five and five-eighths, and one hundred and sixteen thousand—I am not trying to get the exact figures—at five and a half?

A. Yes, sir.

Q. You say you first learned that Naylor & Co. had sold during 1876 to other spring makers from Mr. Hoyt in March, 1877, as I understand you?

A. Yes, sir.

Q. From Mr. Hoyt, the man who made the sale to you?

A. Yes, sir.

Q. And also that they had sold it at less prices than they sold it to you?

(No reply.)

Q. When did you first learn that?

A. I can't say that I learned that from Colonel Hoyt, only I learned that they had manufactured the steel all during the year 1876 and sold it to spring makers.

Q. You learned that in March, 1877, as I understand you, for the first time?

A. Yes, sir.

Q. You had supposed up to that time, from the time you made this contract in March, 1876, they had not sold any of this Star Spring Steel to spring makers?

A. Why, most assuredly, I supposed that, from March, 1876, until the last of the year that they never sold any of it to any spring makers. That is what Colonel Hoyt stated.

Q. And then you did learn in March, 1877, that, as a matter of fact, they had during 1876, made this steel and sold it to spring makers?

A. Yes, sir.

Q. Now, when did you learn that the price at which they had sold to spring makers in 1876, after March 7th, when you made your contract, was a lower price than the price made to you in the contract?

A. I have a letter from them; I have their own letter.

Q. Well, when was it, do you remember?

A. The letter, I think, is here. Naylor & Co.'s letter is here, showing that they sold it in 1876 down as low as five cents.

Q. When did you first learn that fact? That is what I am trying to find out.

A. From that letter, sir, whatever the date is.

Q. Well, I wish you would look at it.

MR. WILLIAMSON. It is attached to this deposition, October, 1877.

Q. Then it was in October, 1877, that you first learned that the price that they made to other parties in 1876, for spring steel was less than your contract price?

A. Yes, sir.

Q. And when was your last payment made to them on account? Can you tell that?

A. Yes, sir; on the first of March, 1877, about $15,000.

Q. When did you first make the complaint, or whatever you choose to call it, to Naylor & Co. in respect to the representations of Colonel Hoyt?

A. I stated to Colonel Hoyt, first of all--I called his attention to it.

Q. And when was that?

A. That was in March, 1877.

Q. After you had paid this money?

A. Yes, sir.

Q. That was the first complaint you made—was to Col. Hoyt, here, personally, in March, 1877?

A. Yes, sir.

Q. At that time you had received all the steel that you have ever received on this contract? You had received the bill in dispute at that time?

A. Well, I think so, sir.

Q. In whose handwriting is that letter, Mr Cooper? (Hands to witness letter dated March 1st, 1877.)

A. Mr. Clark's.

Q. That is the same handwriting, I think. (Hands letter dated November 1st, 1876.)

A. That is my writing, sir.

Q. You say that Mr. Hoyt told you in that conversa-

tion that the firm of Naylor & Co., had only six hundred tons, and that three hundred tons they must reserve for trade outside of steel makers?

A. Yes, sir.

Q. And that three hundred tons was all they could sell to the spring makers?

A. Yes, sir.

Q. That was the substance of his representations?

A. Yes, sir.

Q. And you think he gave you some reason which you can't remember?

A. Yes, sir, I am not clear.

Q. You say this was a peculiar process. Do you know by what process the steel is made?

A. I do not; I can't explain that, sir.

Q. Do you know how it rated in the market with the ordinary Seaman & Martin steel, the new process? It was new then, wasn't it? Well, the Cleveland Rolling Mill adopted it about that time, and the Canton works?

A. Yes, sir. Well, the price was about the same, sir.

Q. Little higher, wasn't it?

A. I don't think it would bring any more in the market at that time.

Q. You preferred it, however, you say?

A. I did.

Q. Had you used any of the Seaman & Martin steel from the Cleveland or Canton Rolling Mill up to the time this contract was made?

A. We had.

Q. Were you using it at that time?

A. In the summer of 1875, we bought from Mr. Otis, Otis steel.

Q. And do you know whether you were still using it in March, 1876, when this contract was made?

A. We were still rolling out the stock.

Q. Using up the stock?

A. Yes, sir.

Q. You still had some on hand?

Y. Yes, sir; small quantity.

Defendants' counsel read in evidence the deposition of Henry P. Tallant, of Boston, taken September 30th, 1879. Which deposition is hereunto attached marked exhibit "F," and made a part of this bill of exceptions.

Defendants also offered in evidence the letters which are marked exhibit "A" and exhibit "B," and attached to said deposition and made part of this bill of exceptions. Also the letters, copies of which are attached to said deposition and marked exhibit "C," "D," and exhibit "E," respectively, and made part of this bill of exceptions.

C. M. CLARK.

C. M. CLARK, one of the defendants, being duly sworn, was examined in chief by Mr. Williamson and testified as follows:

Q. You are one of the defendants, are you, Mr. Clark?

A. Yes, sir.

Q. Partner in the firm of George Cooper & Co.?

A. Yes, sir.

Q. How long have you been connected with that firm?

A. Six years—as a partner, or with the firm?

Q. How long have you been a partner there?

A. Six years.

Q. Have you been in the business longer than that?

A. Been there ten or eleven years—eleven years, I think.

Q. Do you know Col. Hoyt?

A. I do, sir.

Q. Do you remember seeing Col. Hoyt about the 7th of March?

A. I do.

Q. Where did you see him?

A. I saw him at our store on Superior street.

Q. Who was present when you were there?

A. Mr. Cooper and Col. Hoyt were together.

Q. Did you have any conversation with Col. Hoyt at that time?

A. I did.

Q. If so, you may state what was said.

A. Col. Hoyt stated that he had three hundred tons of steel—Star Spring Steel—to sell, and was anxious to sell it to us. He said that he had three hundred tons only to sell to spring manufacturers during the year; there was a reserve of three hundred tons for other purposes—not for spring manufacturers—for merchants—for the merchant trade. He says: "I have an opportunity of selling it to another house, but—I don't intend saying it in a very flattering way at all—I would prefer to sell it to your house."

Q. What else was said?

A. I don't know that I had any further conversation with him in regard to it, except in a general way.

Q. It was in that conversation that he spoke of the Canton matter, was it?

A. Yes, sir, that was after he had some word from Canton.

Q. Said he had?

A. Yes.

Q. Mr. Clark, if you know, I would like to ask you what was the market price of spring steel, say from March, 1876, down to the end of the year?

(Objected to. Objection overruled. Complainants except.)

A. From five and a half to three and three quarters.

Q. Which end was it highest—in March or the other end?

A. It was the highest in March and the lowest at the end of the year.

Q. Three and three-quarters being the lowest price at the end of the year?

A. Three and three-quarters was the price at the end of the year.

Q. Did this Star Spring Steel differ any in price from the ordinary market price of spring steel?

A. Well, it is a different make of steel from Seaman & Martin's steel.

Q. Were both kinds of steel used in the manufacture of carriage springs?

A. They were both used.

Q. Do you know whether it commanded any different price from the other spring steel?

A. Yes, we would pay one-eighth of a cent a pound—

five dollars a ton—more for Star Steel than we would for Seaman & Martin at that time.

Q. The processes for making were different at that time than they are now?

A. Yes, sir.

CROSS-EXAMINATION BY MR. TERRELL.

Q. You say at that time, in March, Cassius, that the market price of steel was about five and a half. Do you mean by that ordinary Seaman & Martin's steel?

A. Yes.

Q. And you put this one-eighth of a cent higher, making it five and five-eighths, being the market price at the time of the contract?

A. Yes.

CHARLES GILLETTE.

CHARLES GILLETTE, a witness called and sworn on behalf of defendants, was examined in chief by Mr. Williamson, and testified as follows:

Q. What is your business?

A. I have charge of the spring works for Geo. Cooper & Co., corner of Main and Center streets, Cleveland, acting in several capacities.

Q. How long have you been in that business?

A. In charge of the factory, sir?

Q. Yes.

A. Well, at times for the last nine years.

Q. How long have you been in that kind of business—whether in charge of the factory or otherwise?

A. In the spring business ever since I started here, sir, nine years—nine or ten years.

Q. And have you been with Cooper & Co. all that time?

A. Yes, sir,—No, sir, I was out one year, sir, I think.

Q. For the last three or four years you have been with them?

A. Yes, sir; last six years.

Q. Do you know Col. Hoyt?

A. I have met him, yes, sir.

Q. How long have you known him?

A. I don't claim to be personally acquainted with him, sir.

Q. How long since you met him?

A. I should think six years ago for the first time.

Q. Do you remember seeing him in March, 1876.

A. I saw him in the spring of 1876, sir; I couldn't say the month; I think it was in March.

Q. Where did you see him?

A. At 88 Superior street.

Q. Who was present at the time you saw him?

A. Mr. Cooper.

Q. Were you present during any conversation with Mr. Hoyt?

A. I was, sir, at that time.

Q. About what time in the day was it?

A. That was just about twelve o'clock, sir.

Q. You may state what was said there by Col. Hoyt while you were present.

A. I came into the office at 88 Superior street. That is called the main office. I received the mail pertaining to the spring business at that place. I am due there every

day at twelve o'clock. I came up for that purpose this day, as I came every other day; and as I came into the door, Col. Hoyt and Mr. Cooper were at the front door. Mr. Cooper stopped me as I came in at the door. I was going through to the office in the center of the building. He says, "Charley,"—always calls me by that name—"Charley, this is Col. Hoyt of Naylor's. He says he has three hundred tons of spring steel to sell. That is all he will have to sell to spring makers. Is that not it, Colonel?" The Colonel says, "Yes." That was about all the conversation during the day to me. I had no conversation further.

Q. You passed on?

A. Passed on to my business.

Q. How long at that time had you been using Naylor & Co.'s steel in your works?

A. Well, we used it in quantities. We had used it some two or three months before that. We bought in 1875 some, sir; we had smaller quantities previous to this in 1875.

Q. But, I say, you have used it mainly in your works since when?

A. Well, since November, say. We began to use it then.

Q. Is there anything peculiar about this steel of Naylor & Co.'s—different from other steels in use in your business? Was there at that time?

A. At that time it was very much different from what is made here under what is known as the Seaman and Martin process, or the Bessemer process. The star steel corresponded and worked——.

Q. You said it was different, I think?

A. Yes; was different.

Q. Go on.

A. I say that the Star steel, as far as the working of it was concerned, was similar and like what we had bought previously of other manufacturers known as blister steel, imported from the old country, made from blister steel ingots, and these steels here are made—are really cast steels. That is the difference.

Q. Is there any of this blister steel manufactured in this country by anybody else than Naylor & Co. that you know of? Do you know how that is?

A. I don't know for certain, sir; I understood there was another party made it.

Q. I will ask you, in the use of it in your works, what difference is there between this steel of Naylor & Co.'s, or Star steel, and Seaman and Martin, or Bessemer steel?

A. Well, it has to be worked in manufacturing springs in a different process; that is to say, the Star steel in the course of manufacturing it, heating it, tempering it, etc., is entirely different from what is known as the Seaman and Martin's. There is different action in tempering it.

Q. In what way do you have to treat it differently in tempering it in your works?

A. Well, they could be made, sir, both upon the same process—that is, in the same manner; but the one had to be used with greater care; couldn't be het to so great a heat, or, in other words, to explain so the jury will understand it, to make a spring and take one piece of Bessemer steel, and one piece of Seaman and Martin's steel, and one piece of Naylor's steel, and put

them together to make a spring it would not be of any value; if you made one spring out of the three different grades, understand, or even two, it would be of no value. While the plate that was made of one kind would be elastic and pliable, the other would bend down like a piece of iron and remain. This arises from the different composition of the two metals when they are het and brought into contact with tempering matter, such as water and oil. The technical term I do not understand in the composition of it.

Q. In tempering was it necessary to use oil in either one or the other?

A. At that time?

Q. At that time, yes.

A. Yes, sir.

Q. Or could oil or water be used indiscriminately at that time?

A. No, sir.

Q. Understand, all my questions have reference to that time. With which one would it be necessary to use oil?

A. Those known as the Seaman and Martin's process or Bessemer.

Q. The other could be tempered without it?

A. They could be tempered either way, sir.

Q. In stopping the use of one kind of steel, and commencing another, is there any expense involved?

A. Yes, sir, considerable.

Q. If so, explain to the jury how it would be?

A. Well, there is several points in regard to it, we considered. In the first place, in the manufacture of springs, the

springs are made of what they call different guages of steel—different thickness—different widths. You, for instance, buy Star steel. You buy steel that you say is an inch and three eights wide. You buy another brand of steel from some other manufactory—say you buy that for inch and three eights steel—they may be an inch and three eights wide, the edges of one may be more convex than the other—be more round and oval; you put the two together and one plate would stick out a little—that is, it would seem to—it would appear to to your eye. Then, in manufacturing springs, the steel usually comes in long bars. They are cut in pieces, lengths suitable, proportionate, to make a spring. You lay your steel out, cut it out in the different lengths that you wish to make a spring. You come down to the end of this bar of steel. You have a piece left that is not quite long enough to make the springs that you are making. You lay that in a rack, save it until you are cutting some springs that that plate will be the right length. And there is a great accumulation of pieces in the course of manufacturing springs of that kind. Some pieces are carried along from week to week, or month to month, and they are used as you can use them—as you have the right lengths to cut—that is to avoid the waste. And then when you compare the different expense of making springs if you use this Star steel and wish to change to Bessemer, or are using the Bessemer steel and wish to change to the Star steel, you would have to keep it entirely separate; you could not work them together at all. That is the main points of difference.

NO CROSS-EXAMINATION.

Defendant's counsel read in evidence a letter from George Cooper & Co. to Naylor & Co., dated Cleveland, March 5th, 1877.

Also letter from Naylor & Co. to George Cooper & Co., dated Boston, March 7th, 1877, containing statement of amount of steel sent by Naylor & Co. to George Cooper & Co.

Also letter from George Cooper & Co. to Naylor & Co., dated Cleveland, October 16th, 1877.

Also letter from Naylor & Co. to George Cooper & Co., dated Boston, October 29th, 1877.

DEFENDANTS REST.

TESTIMONY FOR COMPLAINANTS.

Said plaintiffs, to maintain the issue on their part, offered testimony as follows:

THOMAS J. HOYT, a witness called and sworn on behalf of the complainants, was examined in chief by Mr. Terrell, and testified as follows:

Q. Where do you reside?

A. St. Louis.

Q. What connection have you with the plaintiffs in this case, Naylor & Co.?

A. Do you refer to the present time, or——

Q. Yes.

A. At the present time I am Western Agent for the different houses of Naylor & Co.

Q. What connection had you in March, 1876?

A. I was a manager.

Q. And what were your duties as manager?

A. General management when I was in the east at any of the houses in connection with others; and travel for them.

Q. Make sales?

A. Make sales.

Q. How old a firm is this firm of Naylor & Co.?

A. The firm of Naylor & Co. proper are between sixty and seventy years old; the origin of the firm dates back nearly a century.

Q. What is the extent of their business?

A. Their business in 1872 was sixteen millions. It has not been less than five to six millions since I have had anything to do with them, which is about fifteen or sixteen years.

Q. You made this sale in dispute in this case to Cooper & Co. yourself, I believe?

A. I did.

Q. You may state when you came here to Cleveland, if you know, to make that sale.

A. I can only state from what I have heard this morning. It was sometime in March, 1876.

Q. Was it the same day that the contract was drawn, do you remember?

A. That I can't remember. It may have been the day before; I think very likely it was.

Q. You may state to the jury now, just what you said to Cooper & Co. as preliminary to this contract?

A. Well, gentlemen, I will state it as nearly as I can. It is a good many years back, and I have made a great many contracts since then, but as near as I can remember, it, I made simply the statement that I was authorized to make by a letter from my firm.

(Objected to.)

Q. Did you show the letter to them?

A. I showed the letter to Mr. Cooper; he read that portion of it.

Q. Now, you may tell what statements you made yourself?

A. The statements I made were based on that. The firm——

Q. Never mind about the firm, now. You just state what you said to Mr. Cooper?

A. The firm had six hundred tons of steel left for sale, over and above what they had already made contracts for. Three hundred tons of that they were willing to sell to some spring maker. The other three hundred tons they wanted to keep for their jobbing trade—parties like Bingham, Worthington, Cleveland, Brown & Co., and so on—and I offered it to Mr. Cooper at the price given there. I don't pretend to remember those things. The sale was made finally at five and five-eighths cents for these three hundred tons. During the negotiations I received a telegram from my Boston house that parties—spring makers—

(Objected to.)

Q. You need not tell what was in it. You received a telegram from the Boston house?

A. I received a telegram from the Boston house.

Q. And you told Cooper & Co. what was in it?

A. I did.

Q. What did you say to them?

A. I let them read it.

Q. Well, what did you say to them on the subject?

A. That I could go to Canton—undoubtedly, and make this sale, but I preferred to sell it to them because of our long connection with them, and for reasons which it is not necessary to mention here. Business reasons of a financial character.

Q. Did you state to Cooper & Co., in this conversation, the reasons why it was probable that you would have no more steal that year?

A. I did.

Q. What did you state to them upon that subject?

A. That we were going in to making Seaman & Martin, and wanted the room which was then occupied by these cementing furnaces, in which was made Star steel, for the purpose of putting up Seaman & Martin furnaces. We make our own land, but don't make it up fast enough to put up these Seaman & Martin furnaces. We were, therefore, compelled to take down.

Q. By MR. INGERSOLL. Are you now telling what you told them, or is this an independent fact?

A. I am telling just what I told them, and we had made up our minds to take down two of these cementing furnaces for the purpose of putting up Seaman & Martin furnaces.

Q. By MR. TERRELL. As a matter of fact, do you know how many of these furnaces were taken down that year?

A. No, I do not. It is in the cross-interogatorries there.

Q. And when were they finally all taken down, do you remember that?

A. I think they were all taken down in——last of 1877 or in 1878.

MR. COOPER. July, 1879?

THE WITNESS. Well, it may have been. That I can't say.

Q. And what erected in their place—the Seaman & Martin furnaces?

A. The Seaman & Martin furnaces.

Q. Do you know the amount of orders already on your books on the 7th of March?

A. I do not.

Q. And have you any personal knowledge of the amount of spring steel actually made by the furnaces that year after the 7th of March?

A. No, I don't know. I will state to the jury that my headquarters were in New York, and the steel was made in Boston, and I was therefore not very well posted in regard to the business at the mill.

Q. Do you know where that letter of March 3rd is? It is referred to in this letter of Naylor & Co.'s, read here as having been written to you upon March 3rd?

A. It was given to you.

Q. Well, if it was, I don't know what has become of it. I am not prepared to say it was not.

Q. It is fully corroborated in the letter that——

(Objected to.)

Q. You may state whether, at the time you made this contract with Cooper & Co., you had on hand more than

the six hundred tons, and for sale more than the three hundred.

A. That was all we had for sale at the time.

Q. You may state whether that was the fair market price of the steel at the time the contract was made—five and five-eighths.

A. Yes, sir. It was considered a little under the market price.

CROSS-EXAMINATION BY MR. WILLIAMSON.

Q. You say your residence now is in St. Louis?

A. Yes, sir.

Q. At the time that this contract was made, if I understand you correctly, you resided in New York?

A. Yes, sir.

Q. How long do you say you have been connected with this house?

A. Eighteen years.

Q. At this time this contract was made, you were a kind of manager for them, were you?

A. I was called a *chef* or manager.

Q. And the house, as I understand you, is a very old one?

A. It is a very old house.

Q. Nearly a century old?

A. Yes.

Q. The present members of the house, then, I suppose, are not the original Naylor & Co.?

A. I imagine not. No.

Q. You have been asked about the amount of your sales. Do you remember how large an amount of sales

you made during the year 1874, or the year preceding it, or the year after?

A. I should suppose 1873, 1874, 1875, 1876, somewhere in the neighborhood of ten millions.

Q. At any rate, it was somewhere between the lowest sum you gave of five or six millions and the highest sum of sixteen millions.

A. Yes, sir.

Q. About what proportion of this should you say you made yourself?

A. During all that time, or that one year?

Q. No, that one year.

A. Well, the sales that are more particularly under my charge are western sales. I should say that they would have amounted in 1876 to perhaps, a million and a half.

Q. And with about how many different persons would those contracts be?

A. Oh, that I really could not tell you. That would be all the western States.

Q. Would the number run to a huudred or a thousand, or which would it be nearer?

Q. Well, I should say that they would run somewhere in the neighborhood of about two hundred, or two hundred and fifty people. Will you allow me to explain?

Q. Yes, sir.

A. I don't mean that I have personally seen two hundred and fifty people during 1876, but that the western business, which was more particularly under my charge, the number would be about from two hundred to two hundred and fifty—that is, customersof Naylor & Co.'s, whom

I have at different times to see, so far as I can, anyhow, whose business I influence more or less, or try to.

Q. Well, at this time you were not more particularly engaged in the western business, were you, when you were manager there, or *chef*?

A. Oh, yes; I had charge of the western business.

Q. That was your business in New York, was it?

A. When I was not traveling in the west, I was in the New York office.

Q. Were you a *chef* in the New York house, too?

A. I was simply one among a number of managers.

Q. So that you did not have charge of the sales made at the New York house?

A. Oh, no, sir. There were three partners, I think, at that time—two or three managers—perhaps six altogether.

Q. Well, I suppose you had interviews, as a matter of fact, in 1876, with a great many different men, in the way of making contracts?

A. Great many.

Q. And have had interviews with a great many since, have you not?

A. Yes.

Q. Is there any peculiarity in this contract between you and Mr. Cooper that would give you any particular recollection of it?

A. I should have forgotten all about it, if Mr. Cooper had not disputed it; I have refreshed my memory.

Q. But among the multitude of your transactions you

had forgotten all about it until he disputed it in 1877, nearly a year afterwards, hadn't you?

A. Quite likely.

Q. And it is since that time that you have had your recollection refreshed?

A. I looked up the correspondence at the time that took place in March, 1876, that was pertinent to this very case, and of course, the correspondence subsequent to that.

Q. When was it that Mr. Cooper first called your attention to it?

A. I can't tell you. I have not the slightest recollection about it; I couldn't tell you whether it was within six months afterwards, or eighteen.

Q. Can you tell when it was?

A. No.

Q. Can you tell whether it was by letter or by word of mouth?

A. I could not.

Q. But whenever he first made complaint about it, was the first time that you had your attention called back again to the transaction with Mr. Cooper?

A. Yes, undoubtedly.

Q. Had you had any correspondence between that time with Mr. Cooper, from which you could refresh your recollection?

A. Between the time of the contract and his calling my attention to it?

Q. Yes.

A. Not anything that I could remember at all.

Q. Well, letters from whom was it from which you

refreshed your recollection of what took place between you and Mr. Cooper?

A. The letter which Naylor & Co. wrote me, which I received at the time of making the contract with Mr. Cooper, and upon which I made it, which he read. That was a letter which was probably dated March 1st or 2nd, or somewhere about that time, and then — I can't remember any other letters from that time. That we kept, of course, a copy of. It was sent to me from the Boston house—a copy of the contract. And then whatever correspondence took place afterwards.

Q. At that time, then, you did not have anything to look back to, to refresh your recollection except this letter you had from Naylor & Co.? That was the only thing?

A. Was the only thing.

Q. And the contract itself?

A. And the contract itself.

Q. When you saw that letter from Naylor & Co., did you then recollect that Mr. Cooper saw it?

A. Oh, undoubtedly.

Q. Was it your custom to show your letters that you had from your house in your dealings?

A. Well, when it would assist in making sales.

Q. You thought it would assist in this case?

A. I thought it would assist very much.

Q. And that was the reason you showed it to Mr. Cooper?

A. That was the reason exactly.

Q. How long a letter was this?

A. It was two or three pages. It referred to other mat-

ters. It was not devoted to this thing. It was a letter, perhaps, in answer to mine in regard to many other things —tin plate and a hundred things that we may have alluded to—financial matters, and so on; and a part of the letter spoke of the fact——

Q. I am not asking what it referred to. That letter, then, you had in your possession, had you, at the time that your attention was called to the matter by Mr. Cooper?

A. Not in my possession, no.

Q. Where was it?

A. It was copied into the Boston letter book.

Q. Where had the original letter gone to, that Naylor & Co. had written to you?

A. Oh, the original letter was probably on file among my papers at that time.

Q. Where were your papers along in March, 1877?

A. In New York.

Q. Well, did you look up your papers?

A. I undoubtedly did, after this interview with Mr. Cooper.

Q. Do you remember looking them up?

A. Unquestionably.

Q. Unquestionably you remember it?

A. Yes, sir.

Q. And you found that letter, did you?

A. I found that letter.

Q. And what did you do with it?

A. With that letter?

Q. Yes.

A. Kept it.

Q. What did you mean, then, by saying you got it from a copy, sent from the house?

A. Well, I did not understand the letter that you alluded to. The letter to me, the original, of course, I kept.

Q. What letter was it you supposed I alluded to?

A. I supposed you were alluding to some letter that the house had written to George Cooper.

Q. You have not been asked about any letter to Geo. Cooper. I was asking you all the time about this letter that refreshed your memory.

A. I misunderstood you, sir, altogether.

Q. And you did answer it so, and you meant something else, did you? You did answer it was by a copy?

A. I of course did not allude to a copy from the Boston house of the letter which was written to me, on which I make the sale to Mr. Cooper,

Q. That was the only letter I asked you about.

A. Well, it is quite possible I made a mistake, sir.

Q. Well, you found this letter, as you say, "unquestionably?"

A. Yes, sir.

Q. What did you do with it?

A. I used it to make the matter perfectly plain to my house in Boston.

Q. I don't ask you what you wrote to the house in Boston, but what did you do with the letter itself?

A. Kept it.

Q. Well, where is it now?

A. I gave it, I think, to Mr. Terrell, when I turned over all our papers to him.

Q. When did you turn over all your papers to Mr. Terrell?

A. Well, that I can't tell you. A year or eighteen months ago, when we first put the case in his hands.

Q. You saw him personally, did you, and put this letter in his hands?

A. Yes, sir.

Q. Now, do you think with the refreshing that this letter gave you, and the contract, which were all you had to refresh you, you can give a connected history now of your conversation that day with Mr. Cooper?

A. Oh, yes.

Q. You think you can?

A. Yes.

Q. Well, I wish you would do it, for the information of the jury and ourselves.

A. Beyond what I have already stated?

Q. Just go right over, giving us a connected history of what took place between you and Mr. Cooper that day.

A. Well, to the best of my recollection, I will repeat what I did before.

Q. Where did you see him?

A. At his store.

Q. Anybody else present when you first went in there?

A. I can't say.

Q. Very well.

A. I stated that my house had written me a letter that they had only six hundred tons of steel for sale. I gave him the letter to read—that portion of it which stated that fact.

Q. Did you hand him the whole letter?

A. I handed him the letter, and pointed out the part alluding to this particular business.

Q. Did he read it?

A. He read it.

Q. How much of it was there that alluded to this particular business?

A. Perhaps half a page—twenty lines—only a paragraph.

Q. He read it over, did he?

A. He read it over.

Q. Very well.

A. That three hundred tons of these six hundred we intended to sell to spring makers. The other three hundred tons we proposed to keep for what we call our jobbing trade, who bought in small quantities, and who had depended on us a long while, and we did not wish to put ourselves in a position of not being able to supply it, and as we had only six hundred tons, we had determined to save three hundred for that trade, and the other three hundred we would sell to spring makers. That was about all that took place at that time. Shall I go right on with the whole thing, sir?

Q. Go right on with the whole thing.

A. Later in that day—perhaps the next day, I don't pretend to remember that—I received a telegram from my Boston house that——

Q. I don't ask you for the contents. I will stop there and ask you what you did with that telegram?

A. Well, I really couldn't tell you.

Q. Did you have that when you gave the papers to Mr. Terrell?

A. That I can't tell; don't remember. It was only a few lines. I may have torn it up when I got through with Mr. Cooper—can't tell.

Q. Go on.

A. Shall I go on about the telegram?

Q. Yes.

A. This telegram was from the Boston house, stating that parties at Canton were in the market for a large quantity of steel; I don't know whether they named the quantity or not; my impression is they did, and that it was from from five to six hundred tons; that is only an impression I have; and asking me whether I would be able to go and see them.

Q. Don't you remember whether it stated the number of tons, and that you told him the number of tons, as well as you do the rest of your conversation?

A. No.

Q. Don't remember whether it stated any number of tons at all?

A. I don't remember whether the quantity that these parties inquired for was stated or not.

Q. Or whether you stated it to Mr. Cooper?

A. Or whether I stated it to Mr. Cooper. It is only a general impression I have. I remember the fact of the Canton telegram. The details I can't tell you.

Q. Whether it stated anything about the number of tons, or the amount of the order, you can't tell?

A. I can't tell.

Q. Very well. Go on with what you do remember.

A. Well, I stated that we would prefer to sell this three hundred tons, which we had for sale to spring makers, to George Cooper & Co., to disposing of it in the other direction.

Q. Well, you said there were some other reasons which it was not necessary to mention. Will you mention them now?

A. Well, gentlemen, it is a matter of a little delicacy to mention it. Had no reference to this case whatever.

Q Had some reference to the trade at the time?

A. Not the slightest.

Q. Did you give them as reasons to Mr. Cooper?

A. No. Oh, I have no objection, gentlemen, if you insist upon it. It was for pecuniary reasons. The other parties were not as responsible as George Cooper & Co., and we preferred to sell to George Cooper & Co. for that reason. That is the secret of the business. There are other steel men here present, and I hesitated about speaking.

Q. Go right on, then.

A. That is really all that I have to say, sir.

Q. You drew up this contract, did you?

A. I did.

Q. And wrote your acceptance all on the same day?

A. I did.

Q. Well, you did tell them that the house had but six hundred tons to dispose of during that year, did you?

A. I did.

Q. And that they had but three hundred tons to dispose of to makers of carriage springs?

A. Yes.

Q. And that they wouldn't have but just so much to dispose of during the year?

A. Exactly.

Q. You say that you did go on and give them some reasons for it?

A. Yes.

Q. I will ask you, in the first place, when you had your recollection refreshed about this matter by looking over the letters, did you then think of it just as you have thought of it now? Did the history of the transaction come back to you then just as you have given it to us now?

A. Before I had read the matter up?

Q. Oh, no, after you had looked up your papers?

A. Oh, certainly, after I had looked up my papers.

Q. Well, you looked up your papers at once, I suppose, upon its being called to your attention?

A. Certainly. No, if I recollect rightly, the Boston house wrote to me that Mr. Cooper declined to take this steel, while I was traveling somewhere, and I left it until I could get back and look up my papers.

Q. Your home was in New York?

A. Yes, sir.

Q. And you looked it up as soon as you got back, I suppose?

A. Yes, sir.

Q. You looked it up before you took any action with your house, or with Cooper & Co.?

A. Yes, sir.

Q. Or before corresponding with either of them?

A. Yes, sir.

Q. You did not correspond with either without looking the matter over fully?

A. No.

Q. Now, when you thought the transaction over didn't it come back to you in this form: That it was four hundred and fifty tons you told them that you had instead of six hundred?

A. Four hundred and fifty tons that we had for sale during the year?

Q. Four hundred and fifty tons instead of six hundred?

A. No, sir; I think not.

Q. Now, sir, I want to know if, with that letter before you from your house, your recollection of the transaction was not refreshed that you had four hundred and fifty tons instead of six hundred to dispose of during the year?

A. It may be that my recollection is influenced by all the correspondence that I have read since. I would not answer for that. I would not say, if I had not heard you gentlemen speak of it this morning—I hadn't time even to look up the matter; I dismissed it from my mind after putting it in the hands of onr attorneys, and I should not have recollected the year, the date or the price, or the quantity, if I had not heard them this morning.

Q. Should not have recollected the quantity you had on hand?

A. No, sir, I should not have remembered the quantity, the price or the year.

Q. You would not have recollected whether you told him six hundred tons or four hundred tons?

A. I should not until I had read what memorandum I had, and so on. It is impossible to keep those things in one's mind so long.

Q. Well, after you have read all these things you are now ready to say that what you told him was six hundred tons?

A. Yes, sir.

Q. You are pretty confident of that?

A. Yes, sir.

Q. Is that your letter, Col. Hoyt? (Hands to witness letter dated July 14th, 1877.)

A. Yes.

Q. I call your attention simply to this extract from it—you can read it yourself if you choose—just that paragraph commencing "These facts," and I will ask you a few questions about it. Just read it aloud to the jury.

A. "These facts are, that we told you when taking the order for three hundred tons, that we were taking down two of our furnaces, and had only four hundred and fifty tons, I think, for sale that year."

Q. That was as you thought about it then, of course, when you wrote that letter, July 14th, 1877, undoubtedly, was it not, or else you would not have written it?

A. Undoubtedly that is what I thought at the time.

Q. Now you say you went on in this conversation to give Mr. Cooper some reasons for the fact that they didn't have but six hundred tons?

A. Yes, sir.

Q. Those reasons were not contained in this letter, I suppose?

A. Which letter?

Q. Those reasons that you gave him outside of the letter itself, that you got from Naylor & Co.

A. No; I beg your pardon. The reasons were in the letter, which Mr. Cooper read as well as I.

Q. I understood you stated to him some reasons yourself?

A. Not outside. You would not allow me to say that I got that statement from the letter.

Q. I don't care where you got it. You did make certain statements, did you?

A. Exactly.

Q. Giving the reasons why you didn't have but so many tons to dispose of?

A. Yes.

Q. Now, will you just give those reasons over again, because I want to ask you some questions about them?

A. Yes, sir. The reasons were that we were about taking down two of our cementing furnaces to make room for furnaces for making Seaman & Martin steel, and that would lessen our production in such a way that with what we had already sold, we would only have six hundred tons left for sale during the rest of the year.

Q. You went on to say something further, about the situation of the furnaces down there, so that you did not have room for any more furnaces?

A. Oh, yes.

Q. Was that in the letter too, or was that information that you gave him outside?

A. No. I presume that was simply from my knowledge of the works. That was in regard to our making ground by cinders and so on. That was what I added.

Q. Do you know yourself the capacity of the furnaces for making steel?

A. Yes. I know that the cementing furnace is loaded with twenty tons. I don't know how often our furnaces were run, whether they were loaded continuously or not. I know they are loaded with twenty tons, and it takes two weeks to bake them.

Q. That is, each furnace?

A. Yes.

Q. That would be an average of ten tons a week to each furnace, if it was kept steadily at it?

A. If they were kept steadily at it. That is never done.

Q. How long do they let them rest before they put in again, if you know?

A. Well, I don't know. I think it depends a great deal upon how much the furnace is injured during the time it is fired up. Probably some of the inside flues have to be renewed.

Q. Did you know how many furnaces they had at that time?

A. No, only from what I heard this morning.

Q. You did not know at that time?

A. Oh, I undoubtedly knew, because I had perhaps

been at the works within three or four or five months, but I don't remember at all.

Q. And the reason they did not have any more of this, if I understand you rightly, was they were going to take them down, and they were going to put up Seaman & Martin furnaces?

A. Yes.

Q. Did you ever have any information that the reason they made more steel that year than you told Cooper & Co. they were going to make, was that they put up some of these furnaces after taking them down? Never heard of that?

A. Don't think they took them down, if my recollection serves me rightly.

Q. I do not mean the Seaman & Martin furnaces, but these Star steel furnaces. You say they did take them down?

A. No, I don't. During 1876 I don't think they did—not until along in 1877, if I recollect rightly.

Q. You told Cooper & Co. they were going to take them down?

A. I told Cooper & Co. they were going to take them down at once.

Q. But, as a matter of fact, you think they did not take them down during the year 1876?

A. No.

Q. Did you ever have any information that they took them down, and put up some of them again?

A. No; don't remember.

Q. Well, you look at this letter again, and just read

that next paragraph after the one I called your attention to. Just read it aloud, please.

A. "This was the truth, and we did take them down, but orders came in so rapidly that we were compelled to replace them, and thus increase our production." Then that was a fact.

Q. Although you had forgotten it now, at this date?

A. Oh, I have forgotten it, certainly. It was a fact, undoubtedly.

Complainants counsel read in evidence letter from George Cooper & Co. to Naylor & Co., dated November 1st, 1876, and which is hereto attached, marked Exhibit P. and made part of this bill of exceptions.

Complainants rest.

DEFENDANTS' REBUTTAL.

GEORGE COOPER, defendant, recalled, testified in rebuttal as follows:

Q. (By Mr. Williamson.) You have heard that letter read to the jury. I will ask you what it was you referred to in that letter? (Letter dated Nov. 1, '76.)

A. Well, in the last of October, a young man came into our store and sat down by the stove, making no remarks whatever. He sat there for some time, and afterwards said that he was a workman for Naylor & Co., and had been out here, I think, to look at some furnaces that Otis was putting up; and I asked something about steel and the price of it, etc. He said it was not his business to sell steel, but he knew of a sale being made to some parties in Albany at five and three-eights. That was all that gave rise to this. I told Col. Hoyt of that in March, 1877, and

he said that the young man had no authority to quote prices to anybody.

Q. Do you remember whether you got any answer to that?

A. I do not. I don't remember.

Q. You would not know whether that was an answer or not?

(Hands to witness letter dated November 3rd, 1876.)

A. Let some one read that to me. I don't think I could read that.

Q. (Letter read.) Did you get any other information than that?

A. No, sir.

CROSS-EXAMINATION BY MR. TERRELL.

Q. Who was this boy that dropped into your store accidentally?

A. I don't know anything of him, sir.

Q. You never saw him before?

A. No, sir.

Q. And never heard of him since?

A. Allow me to say that I called Col. Hoyt's attention to——

Q. Never mind what you called Col. Hoyt's attention to. Answer my question. Have you ever heard of him since?

A. Allow me to ask you a question.

Q. Certainly.

A. Would Col. Hoyt's answer, for instance, to my statement, be hearing from him? He said that young man had no authority to quote prices.

Q. That is the only time you have heard of him since, is it?

A. Yes, sir.

Q. Did Col. Hoyt pretend to know who he was?

A. He did; yes, sir. He said he had come out to see some furnaces that was recently put up.

Q. For whom?

A. For Otis.

Q. When was that that he had come out to put up the furnaces for Otis?

A. Few days previous to writing that letter; probably in the latter part of October.

Q. Latter part of October, then?

A. It might have been in the early part of October.

Q. Well, put it when you want it. You know better than I do. When do you say it was?

A. I say in October, sir, 1876.

Q. What time in October?

A. Judging from the date of that letter, I should say towards the last of October.

Q. You wrote Naylor & Co. a letter on the 30th of October?

A. First of November, sir.

Q. You wrote them one on the 30th of October, also, didn't you?

A. I don't remember, sir.

Q. Well, let us look and see (hands letter to witness).

A. Well, that is mine. That is all right, sir.

Q. Had you heard of it at that time?

A. I think so, sir.

Q. Why didn't you say something in that letter about it?

A. Col. Hoyt had fortified himself thoroughly then, sir.

Q. I am talking about why you didn't say something about their selling steel to somebody else for less than they sold it to you when you wrote that letter on the 30th day of October?

A. He had reserved three hundred ton of steel to sell to hardware men, and the young man stated that this steel went to Albany. Now, I knew of no steel spring makers in Albany. I don't believe there is any.

Q. That don't answer the question why you did not say anything about it on the 30th of October.

A. I can't say, sir, why.

Q. You say in your letter that you heard they were selling spring steel, don't you, for less?

(Objected to.)

Q. Now, what did you say that for, if you supposed that they were selling to outsiders, and not spring makers in Albany?

A. I could not suppose that they were selling to a spring maker in Albany.

Q. You say in your letter that you heard they were selling Star Spring Steel.

A. This is just what the young man said, sir.

Q. But you say now that you did not at first suppose to spring makers, because you did not think there was any in Albany?

A. I knew of none in Albany, sir.

Q. To whom did they sell steel?

A. To hardware men, sir—to William Bingham; to George Worthington.

Q. To job spring makers?

A. And blacksmiths generally.

Q. Blacksmiths make springs, don't they?

A. Generally, sir.

Q. In other words, you don't know of anyone engaged wholly in making spring in Albany?

A. I don't, sir, now.

Q. You did not know whether that young man had authority from the house, when you wrote that letter of the 30th of October?

A. My supposition would be that he had.

Q. You don't know why you did not write in your first letter concerning that, but postponed it until November 1st, except it happened so? In other words, why didn't you call the attention of Naylor & Co. to this fact in the first letter that you wrote them after you learned of the fact?

A. Well, we had made a contract with them in good faith.

Q. Yes.

A. They had reserved three hundred ton to sell to outsiders. I inferred that that went into the hands of outsiders, of course, being in Albany.

Q. That was just as true on the 30th of October as it was on the 1st of November, was it not? Does that explain why you did not write on the 30th of October?

A. I can't explain it to you, sir.

Q. I have asked you if it was a mere accident?

A. It was a mere accident, sir.

Q. That is the only information you had was from this young man?

A. Yes, sir. I don't remember of anything else, at any rate; I don't remember any other information.

Q. And the best information you can give us now is that it was somewhere in October?

A. Yes, sir.

Q. And you think from the date of this letter probably the latter part that he came in. What did he come in for, do you recollect?

A. I don't know. Perhaps he may have heard of us as spring makers.

Q. He did not state his business?

A. Not at all, sir.

Q. Did not speak of any business?

A. It may be possible that he said he had come to look at some furnaces of Otis.

Q. You said he came in and sat down by the stove, and did not say anything?

A. For some time.

Q. Now you say possibly he came in to look at some furnaces for Otis?

A. So he said, to the best of my rememberance. And that is what Col. Hoyt told me long afterwards when I called his attention to the fact of this young man being here.

Q. You say he told you that he came here to look at some furnaces for Otis—Col. Hoyt did?

A. That Otis had put up.

Q. That he came here to town to look at some furnaces that Mr. Otis had put up?

A. That Mr. Otis had just put up.

Q. You mean the Seaman & Martin furnaces?

A. I suppose, sir.

RE-DIRECT EXAMINATION.

Q. One question I omitted. Did you see any letter from Naylor & Co. to Hoyt at the time of this interview on the 7th of March?

A. No, I did not.

Q. Did you read any such letter?

A. No, sir.

Q. Did you read the telegram that he had in his hand?

A. No, sir.

RE-CROSS EXAMINATION.

Q. He had them there?

A. He had the telegram in his hand. I remember the telegram.

Q. You did not read it, you say?

A. No, sir.

Q. And you say you did not see the letter at all?

A. I never saw it.

(TESTIMONY CLOSED.)

And thereupon the Court charged and instructed the jury in said cause, as follows:

CHARGE TO JURY.

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE NORTHERN DISTRICT OF OHIO.

B. SCHLESINGER ET AL., vs. GEORGE COOPER ET AL. } CHARGE TO JURY—WELKER, JUDGE.

CLEVELAND, O., February 12th, 1880.

This action, gentlemen, is brought by the plaintiffs against the defendants on an account, for a certain quantity of steel sold and delivered by the plaintiffs to the defendants, upon which account a balance of $570.56 is claimed to be due by the plaintiffs.

So far as this account is concerned, and the action upon this account, there is no controversy made on behalf of the defendants. The answer that they file is in respect to another claim that they have and claim to have against the plaintiffs in this suit by way of a counter-claim growing out of the same transaction. So that, at any rate, under the pleadings and the evidence in the case, this plaintiff is entitled to recover the $570.56, with interest from the time of the delivery of the articles, until the first day of this term, so far as this account is concerned.

But the defendants, by way of a counter-claim, set up in their answer that they have sustained a large amount of damages by reason of the fraud and misrepresentations of the plaintiffs in relation to the sale and the purchase of a large quantity of steel, at the time when it is said an agree-

ment was made for the purchase of three hundred tons of steel. These representations you have heard read, and they charge the plaintiffs in this suit with certain false representations in regard to the quantity of steel that the plaintiffs had on hand at the time this contract was made, and in addition to that as to what they proposed to do in the manufacture of steel for the coming season and coming year. These representations are denied on behalf of the plaintiffs in this suit, and you are to try the question growing out of the answer of these defendants in this respect precisely in the same manner as if the defendants, Cooper & Co., had brought their action founded upon a fraud perpetrated by the plaintiffs upon them in the sale of that quantity of steel; and you are to require them to make out precisely the same state of facts that would be required if they had brought an independent and a separate action against these plaintiffs for the recovery of damages for the breach of that contract.

Now, there are certain elements connected with this sort of actions brought in our courts that must be established and made to appear by a party who seeks to recover damages for a fraud occassioned by a misrepresentation of facts in relation to a contract that may be made between parties in the purchase of property, as well as any other contract, and it will be my duty, gentlemen, to call your attention on this branch of the case to the elements that are necessary to be made out by these defendants against the plaintiffs on this claim to entitle them to recover damages for the fraudulent representations that they claim were made at that time.

This contract, it is said, was made on the 7th day of March, 1876, and it consisted in a written contract, or an order, by which the defendants ordered the delivery to them, as they might direct thereafter, of three hundred tons of steel, for the manufacture of buggy springs by the defendants in this action.

In the first place, there is a general rule that you are to apply to these actions of fraud, and that is, that the fraud alleged by the party complaining of the fraud must be established in the proof.

You are not authorized to make any presumptions of fraud; it must be made out by the party that sets up the fraud. It is not always necessary that it should be proved by positive and direct affirmative testimony, for frauds are not established in that way; but the fraud may be made out in the matter of the conduct and contracts between parties, by proving different circumstances connected with the parties at the time that the contract that is said to be fraudulent was made. So that you will not hold a party setting up a fraud to positive and direct proof, but it must be made out by a fair preponderance of proof to your satisfaction that a fraud was committed, before a party is entitled to recover damages for the fraud thus committed in a transaction for the sale of property, as well as anything else.

There are several elements necessary to be established for the purpose of laying the foundation for an action founded upon fraud. In the first place, the representations that are made by a party must have been false at the time they were made. The first thing that you will

have to do, gentlemen, in the light of the proof, will be to find out exactly what representations were made by the agent of these plaintiffs, Col. Hoyt, at the time when this contract was made. Fix that in your minds exactly, as to what those representations were, and what was said by these parties at the time when it is said this contract took place in relation to the sale of this steel.

Then, in the next place, you must ascertain from the proof whether those representations were true or false. If they were true, then, as a matter of course, the defendants in this action have no right to recover by reason of the representations, for they would not have constituted, in the eye of the law, fraud for which this action might be maintained.

Perhaps I might remark here that the representations made by the agent or manager, Col. Hoyt, or the knowledge of Col. Hoyt, would be the representations and the knowledge of the principals behind him, the plaintiffs in this action. There is no dispute but what he was the authorized agent to transact this business, or to make this sale, and whatever he said, and whatever he did, and whatever knowledge he may have had at the time, would be the knowledge and the acts of the principals who stood behind him, the plaintiffs in this suit.

In the first place, were these representations false? First find out what they were exactly, as made out in the proof. The allegations of the representations that were made are contained in the answer, but you must be governed by the representations that are made out before you

in the proof, being substantially the same representations as are set out in the answer of the defendant, Cooper.

If a man represents as true that which he knows to be false, and makes the representation in such a way and under such circumstances as to induce a reasonable man to believe that it is true, and is meant to be acted upon, and the person to whom the representation has been made, believing it to be true, acts upon the faith of it, that is such a fraud as will authorize a party to recover upon a fraud of that kind practised upon him.

There is another element in this case, and that is that although these representations may have been false, it is to be established that the party making the representations knew them to be false at the time the representations were made, and you are to judge of the situation of these parties at the time when the contract was made. For, if any fraud existed, it existed at that time and entered into that contract, and would, if made out in the eye of the law to be fraud, destroy the obligatory character of a contract thus made. So that, in judging of the knowledge of the party, the representations of the party, and the fraudulent purposes of the party, you look into the circumstances surrounding the parties at the time, in order to ascertain whether there was such a fraud as claimed by the defend ants in this suit.

As to the knowledge of the plaintiffs, or the agent of the plaintiffs, I direct you that it is not necessary to constitute a fraud that a man who makes a false statement should know precisely that it is false.

It is enough if it be false, and if it be made recklessly

and without an honest belief in its truth, or without reasonable ground for believing it to be true, and be made deliberately, and in such a way as to give the person to whom it is made reasonable ground for supposing that it was meant to be acted upon and has been acted upon by him accordingly.

Now, it is important that this party knew, or had reason to know, that the representations that he was making at the time were false, so as to make an element constituting a fraud that would entitle a party like the defendants to maintain a suit upon it.

Then, in the next place, it must be established that the party, by representations, intended to commit a fraud upon the party, an intention to deceive being a necessary element or ingredient of fraud. A false representation does not amount to a fraud in law unless it be made with a fraudulent intent. There is, however, a fraudulent intent if a man, who either with a view of benefiting himself or misleading another into a course of action which may be injurious to him, makes a representation which he knows to be false, or which he does not believe to be true.

Apply these general propositions to the matter of the knowledge, and of the intent of the agent of the plaintiffs, or the plaintiffs themselves, in these representations, and it is for you to say whether these elements necessary to be established have been made out.

In the next place, it is not every misrepresentation in the making of a contract that constitutes a fraud upon which a party may rely to set aside the binding obligation of the contract.

The misrepresentation must be in relation to a fact, or a state of facts which is material to the transaction, and the determining ground of the transaction. There must be the assertion of a fact on which the person entering into the transaction relied, and in the absence of which it is reasonable to infer that he would not have entered into it at all, or at least not on the same terms. Both facts must concur. There must be a false and a material representation, and the party seeking relief should have acted upon the faith and credit of such representation. A man to whom a particular and distinct representation has been made is entitled to rely on the representation, and need not make further inquiry. But if he have knowledge to the contrary at the time, then it does not constitute a fraud upon him.

Another general principle: A representation to be material should be in respect of an existing and ascertainable fact, as distinguished from a mere matter of opinion or advice. In many of these trading transactions there is a system of misrepresentation in regard to the value of property, and several other things that sometimes enter into a contract, that does not constitute representations of existing facts, but simply the opinion or advice of the party that makes the representations; and that class of representations does not constitute and lay a foundation for the maintenance of an action for fraud. It must be a representation of existing facts that turn out to be false, and that the party at the time knew to be false.

Now, gentlemen, these are general principles that you are to look into in order to ascertain, in the light of the

evidence, whether the defendants in this action have been able to substantiate, by a fair preponderance of proof on their side, taking all the evidence together, that these representations were of this character—that they were false, that the party knew them to be false, and that they were made for the purpose and with the intent of defrauding this party at the time they were made, these all constituting elements necessary to be made out in order to maintain this sort of an action.

If the defendants have failed to establish these necessary ingredients on their behalf, then they have no right to recover any damages by reason of this fraud, as they allege in their answer. If they have established them to your reasonable satisfaction by the proof, then your next inquiry will be as to the amount of damages which these defendants are entitled to recover by reason of this fraud. This being an action for a fraud growing out of the purchase of three hundred tons of steel, it is an important question to ascertain what is the measure of damages in case this fraud is made out.

It is claimed on behalf of the defendants who set up this cause of action against the plaintiffs that their measure of recovery is the reduced market price of the steel before and at the time of the delivery of the respective quantities of steel that were to be delivered by the terms of the contract.

It seems that the contract was made on the 7th of March, and that the steel was to be delivered at different times on the order of the defendants, as they might want

the steel for the purpose of running their manufactory in the city of Cleveland.

On the other hand, it is claimed by the plaintiffs in this suit that the measure of damages is simply the market value of the steel at the time when this contract for the purchase of the three hundred tons was made.

And it is made the duty of the Court to give you the rule as to the measure of damages between the contentions of these parties, as the true rule that the law lays down for that purpose. I direct you upon that subject that the general rule for an action of that kind, and for a fraud of that kind would be the difference between the agreed price that was procured by fraudulent representations and the market price of the article purchased at the time when the sale was made, for if the property was of the value that was agreed to be paid at the time, then there was no fraud perpetrated as to the price which was agreed to be paid for the steel growing out of any representations in relation to it. But these representations are of a peculiar nature. It is said that the representation was that these parties had but three hundred tons of steel to be put upon the market during the year for the purpose of being manufactured into springs, and that they had but six hundred tons of steel to be put upon the market during the whole year for all purposes. Now, I direct you that if this representation was false, and these parties did go and place upon the market greater quantities of steel than they said in their representations they had, then, to whatever extent the placing of that quantity of steel upon the market would have re-

duced the market price of steel, the defendants in this action would be entitled to recover. But they would not be entitled to recover a reduction in the price and the value of steel occasioned by other things over which the plaintiffs in this suit had no control, and not growing out of the fact that these plaintiffs did, contrary to the representations and statements of this agent, place upon the market a greater quantity of steel.

Look into the evidence and see whether the fact that these parties did put eight or nine hundred tons, as claimed by the defendants in this suit, upon the market, affected the market—the price of the steel; for, if a party may be induced by false representations to make a purchase of a quantity of goods at a certain time, and does not pay any more than the market price for them, then he takes the risk of the falling of the price of the article at the time when it is delivered, and the contract price fixes the amount to be paid at the time when the contract is made, and not at the time of the delivery of the goods. If in this case the defendants were to pay the contract price at the delivery, then, of course, that would be another question; but they agree by this contract to fix a price which they shall pay for the whole three hundred tons, to be delivered as they might direct.

If these representations were false, and these parties did, contrary to the representations, place upon the market this increased quantity of steel, and that affected the market, then, to the extent of that affectation of the market, these defendants would be entitled to recover from the plaintiffs their damages.

Now, with that rule, take the evidence, and it is for you to say how much these defendants, if they have made out their suit, are entitled to recover in this action, and whatever amount you may find in favor of the plaintiffs on this branch of the case will be taken from the amount that the defendants are entitled to recover, and your verdict would be for the balance in favor of the defendants, if their damages should exceed the amount of the plaintiffs' claim. If, however, the defendants' case is not made out, then your duty will be to return a verdict in favor of the plaintiffs for the amount of the steel that is charged in the account.

In relation to one question raised by counsel, and that is, that where it has been discovered, after representations are made, that the representations made by the party were false, it would be the duty of these plaintiffs to have notified the defendants of the mistake that they made in relation to any fact that had been represented. That is a correct principle of the law, and if these parties discovered that their representations were untrue, at any time after they had made them, it was their duty to inform the defendants of that discovery of their mistake, and to correct it. If they did not, then it amounts to a fraud, the same as if they knew it to be a fraud at the time when their representations were made. That reflects back to the original time of the making of the contract, and the failing to give this notice and make the correction would give them knowledge, and would be regarded against them the same as if they had the knowledge and information at the time

the contract was made. It reflects back, and makes it a fraud at the time when the representations were made.

And thereupon and at the time said defendants excepted generally to said charge and instructions to the jury, and especially excepted to the charge of the Court that a representation to be material should be in respect of an existing and ascertainable fact as distinguished from a mere matter of opinion or advice, and also to the charge that "it must be representation of existing facts, that turn out to be false, and that the party at the time knew to be false," and also, and especially to the charge of the Court and the direction "that the general rule of damages for an action of that kind, and for a fraud of that kind, would be the difference between the agreed price that was procured by fraudulent representation and the market price of the article purchased at the time when the sale was made."

And also especially to the charge and instruction of the Court that defendants "would not be entitled to recover a reduction in the price and the value of steel occasioned by other things over which the plaintiffs in this suit had no control, and not growing out of the fact that these plaintiffs did, contrary to the representations and statements of this agent, place upon the market a greater quantity of steel." And also generally to the rule as to the measure of damages given by said Court to the jury.

And thereupon said defendants prayed that this, their bill of exceptions in that behalf might be allowed, signed and sealed, which is accordingly done in open court, and

at a day in said term, and is ordered to be made a part of the record in said case.

[SEAL.] M. WELKER,
District Judge U. S., N. D. O.

DEPOSITION OF HENRY P. TALLANT.

BARTHOLD SCHLESINGER ET AL., No. 3829. vs. GEORGE COOPER ET AL. } CIRCUIT COURT OF THE U. S. FOR THE NORTHERN DISTRICT OF OHIO.

The deposition of Henry P. Tallant, taken on behalf of the defendants at Boston, Massachusetts, September 30th, 1879, before William A. Hayes, Jr., a Notary Public within and for the county of Suffolk and commonwealth of Massachusetts, to be read in evidence on behalf of the defendants in an action pending in the Circuit Court of the United States for the Northern District of Ohio, in which Barthold Schlesinger et al. are plaintiffs and George Cooper et al., defendants, Samuel E. Williamson, Esq., appearing for the defendants and William S. Hall, Esq., appearing for the plaintiffs.

Direct interrogatories by Mr. Williamson for the defendants, and answers of the witness thereto:

Q. 1. What is your name, age, residence and occupation?

A. Henry P. Tallant. Forty-seven. Boston. Clerk. Confidential clerk for Naylor & Co., the plaintiffs.

Q. 2. How long have you been in that employment?

A. Nineteen or twenty years. I have grown up in the

business until I have become chief clerk of the Boston house.

Q. 3. What was the business of the plaintiffs in 1876?

A. Dealers in iron and steel, and manufacturers of the same.

Q. 4. Did they then manufacture a kind of steel known as "Star spring steel," and if so, how long have they manufactured it?

A. They did manufacture it, and under that name, or some other name, had manufactured it for five or six years previous to 1876. They do not manufacture it now. They have manufactured it up to about July of the present year.

Q. 5. Was this a kind of steel peculiar to the plaintiffs?

A. The brand Star was our private brand. The steel was similar to that made by some other parties.

Q. 6. Where was the manufacture of the steel carried on?

A. At the Norway Iron Works, South Boston.

Q. 7. How many furnaces did the plaintiffs have for the manufacture of this steel?

(Objected to as incompetent.)

A. I do not know.

Q. 8. Have you any means of ascertaining how many furnaces the plaintiffs had in March, 1876, for the manufacture of this steel?

A. No.

Q. 9. State, if you can, how many furnaces plaintiffs had for the manufacture of steel in March, 1876?

(Objected to as incompetent.)

A. Seven or eight. I can't tell exactly what number, as we were making changes in furnaces at about that time.

Q. 10. State, if you can, how much "Star spring steel" the plaintiffs manufactured during the year 1876, after March 7th of that year?

(Objected to as incompetent.)

A. I cannot tell.

Q. 11. Have you any means of ascertaining how much much "Star spring steel" was manufactured by plaintiffs during that time?

A. I can ascertain nearly. I can do so by reference to my books, and will answer your question—seven or eight hundred tons, about seven hundred, and about five hundred tons for which we had taken orders previous to March 7th.

Q. 12. How much "Star spring steel" did the plaintiffs sell in 1876, after March 7th of that year?

(Objected to as incompetent.)

A. About six hundred tons in addition to what we sold to Cooper. We sold and delivered about six hundred tons in addition to what we sold to Cooper.

Q. 13. What was the lowest market price of "Star spring steel" during that time?

(Objected to.)

A. The lowest at which we sold was five cents on ten days time. That is the lowest market price I know anything about.

Q. 14. What customers, if any, to whom you sold spring steel during that time were carriage spring manufacturers?

(Objected to.)

A. Nearly all of them.

Q. 15. Please give the names and residences of the customers to whom plaintiffs sold Star spring steel in 1876, after March 7th of that year?

(Objected to as incompetent, and calling for disclosures of the plaintiffs' private business not material to the case.)

A. I decline to give the names of persons to whom was sold "Star spring steel" during that period. I will give their names if ordered by the Court. We sold to nearly all large steel spring manufacturers in New England and New York, and one hundred and fifty tons about to a firm in Michigan, steel spring manufacturers.

Q. 16. Please look at the letter now shown you, dated October 29th, 1877, and, if you know, state by whom it was written, and by whom signed?

[Letter is shown witness, marked "Exhibit A., W. A. H., Jr.," and attached to this deposition.]

(Objected to.)

A. I think by our corresponding clerk, Mr. J. M. Clark, and signed by Sebastian B. Schlesinger, one of the plaintiffs.

Q. 17. Also please look at the letter now shown you, marked "Exhibit B., W. A. H., Jr.," and attached to this deposition, and, if you know, state by whom it was written, and by whom it was signed?

[Letter shown witness.]

(Objected to.)

A. I think by the same parties, written by J. M. Clark and signed by Sebastian B. Schlesinger.

Q. 18. Do you know Thomas J. Hoyt?

A. I do.

Q. 19. What connection, if any, has he with plaintiffs?

A. He is clerk or agent.

Q. 20. In March, 1876, what connection, if any, did he have with plaintiffs?

A. He was clerk, I think.

Q. 21. What was his business as clerk?

A. Principally salesman.

Q. 22. How long has he been in the employment of plaintiffs?

A. I should say sixteen or eighteen years, perhaps longer.

Q. 23. What authority, if any, had he to sell steel, and make contracts for the sale of steel, in March, 1876?

A. The usual authority of a salesman.

Examination adjourned until 9:30 o'clock, A. M.

OCTOBER 1st, 1879. W. A. H., Jr.

Q. 24. What changes, if any, were made in the number of your furnaces between March 7th, 1876, and the end of the year?

(Objected to.)

A. We tore down two or three after March 7th, and did not put them up again. We had eight furnaces at about the beginning of 1876, and at about the end of the year we had five. I cannot tell exactly what time of the year they were torn down.

Q. 25. What was the capacity of the plaintiffs' furnaces for the manufacture of steel?

(Objected to.)

A. From forty to fifty tons per week.

Q. 26. Are you acquainted with the handwriting of Mr. Sebastian B. Schlesinger and of J. M. Clark?

A. I am.

Q. 27. Have you the order of the defendants for steel in 1876, and if so, will you please attach it to your deposition?

A. I have the order, and will produce and annex a copy. I decline to annex the original.

(The witness produces a paper, which he says is the original order, a true copy whereof is hereto annexed, marked Exhibit "C." W. A. H., Jr.)

Q. 28. Have you the letters of George Cooper & Co., to which the two letters, marked Exhibits "A." and "B." are answers, viz: One dated March 5th, 1877, and the other dated October 16th, 1877?

A. I have.

Q. 29. Will you please attach them?

(Objected to as incompetent.)

A. I decline to attach the originals, but attach copies marked Exhibits "D." and "E."

(The witness produces two letters, copies of which are attached, marked Exhibits "D." and "E." W. A. H., Jr.)

Q. 30. Was all the spring steel sent to defendants paid for, except the amount now in suit?

A. I believe it was.

Q. 31. Were your furnaces, or any of them, adapted or used specially for the manufacture of "Star spring steel?"

(Objected to.)

A. About five and a half cents was the average price that we received.

xQ. 3. Was the market in all iron and steel products including "Star spring steel," from and after March 7th, 1876, a falling market during that year?

A. It was generally.

xQ. 4. Was the decrease in price of "Star spring steel" during the year of 1876 owing to the amount manufactured by you?

(Objected to.)

A. They were what are known as cementing or converting furnaces, producing blister steel by the use of charcoal. Any such steel, blister steel, can be made in them. The "Star spring steel" was rolled from blister steel.

Q. 32. How did the market price of "Star spring steel" vary, if at all, during the different months of 1876, after March 7th of that year?

(Objected to.)

A. Our sales were at prices from six and one-eighth cents or over to five cents per pound, this last being for one lot of fifty tons, all other sales being five and one-fourth cents or higher. I have no means of ascertaining the market price of other manufacturers. If you are going on the "Star spring steel," no others make it but ourselves, "Star" being our private brand.

Q. 33. Did prices vary to any extent in proportion to the amount of the order?

(Objected to.)

A. Yes, according to the amount of the order, and the

disposition of the customer. Sometimes we got a larger price for a larger order. For instance, we sold in September fifty tons for five cents to one party, and seventy tons at a higher price to another.

Q. 34. Will you give the different amounts of "Star spring steel" sold in each month of 1876, after March 7th of that year, and upon orders received after that time?

(Objected to.)

A. I cannot now.

Q. 35. Can you give the amount nearly?

(Objected to.)

A. Yes.

Q. 36. Please do so.

(Objected to.)

A. In May, 1876, about two hundred tons. In each of the other months of the year from fifty to one hundred tons.

Q. 37. State as nearly as you can the amounts of "Star spring steel" which you sold in March, 1876, after March 7th.

(Objected to.)

A. From seventy-five to one hundred tons in March. In April from twenty-five to fifty tons. In May, I have stated in my previous answer. In June from forty to sixty tons. In July from thirty to sixty tons. In August from twenty-five to fifty tons. In September about one hundred tons. In October from fifty to seventy-five tons. In November and December from twenty-five to fifty tons in each month. The total quantity being from seven hundred to eight hundred tons, as previously testified. This is

exclusive, the particular amounts above given, I mean, of the amount sold to Cooper & Co. I decline to give the particular amounts more specifically, only for the reason that I am unwilling to disclose each and every private transaction of our firm with other customers, unless ordered by the Court.

Not waiving any objection heretofore made, the following cross interrogatories are propounded *de bene* on behalf of the plaintiffs by William S. Hall, their attorney.

CROSS-EXAMINATION.

xQ. 1. On March 7th, 1876, what was the market or going price of "Star spring steel?"

A. About five and seven-eighths cents, say from five and three-fourths to six cents per pound.

xQ. 2. What was the average price from March 7th, 1876, to January 1st, 1877?

(Objected to.)

A. No.

xQ. 5. To what cause, if any, was this decrease due?

A. The lower price of material, the great competition, and general depression of business.

xQ. 6. At the time this contract was made, March 7th, 1876, did the plaintiffs' firm expect to make more of "Star spring steel" than the quantity on hand, and in process of manufacture?

(Objected to as irrelevant and not proper cross-examination.)

A. Yes.

xQ. 7. At the time of making said contract what was the

amount of "Star spring steel" on hand in process of manufacture, and including what you expected to make during that year?

(Objected to for above reasons.)

A. I cannot tell.

RE-DIRECT EXAMINATION.

Q. 1. What was the largest order which plaintiffs received in 1876 after March 7th, of that year, and during what month?

(Objected to.)

A. Two hundred tons in May.

Q. 2. Was that order filled during the year?

A. Probably it was.

HY. P. TALLANT.

EXHIBIT "A."

W. A. H., JR.

NAYLOR & CO.,
NORWAY IRON WORKS.

6 OLIVER STREET,
BOSTON, Oct. 29, 1877.

MESSRS. GEO. COOPER & CO.,
CLEVELAND, OHIO,

Dear Sirs:—Your favor of the 16th inst. is before us, and we are very glad to have you state so clearly and so fully your understanding of the contract between us of March 7th, 1876, for we were under the impression that you claimed that you bought 300 tons

of 2000 lbs. each, and therefore the order was nearly if not quite filled. This seemed to us so much at variance with all our previous transactions with you that we are glad to find that we were mistaken in this impression, and that you had quite different grounds for declining to take the full amount of steel for which the contract called.

In reply to your statements allow us to say that on the 3d of March, 1876, we wrote to Col. Hoyt with a statement of our stock of steel on hand and in process of manufacture and what we expected to make during the remainder of the year, and deducting from this total the amount of the orders which we then had, there were about *600 tons* left. This was the ground of Col. Hoyt's statement to you. On the 3d of March, 1876, we received a letter from a large concern in Canton, Ohio, stating that they were ready to contract for "Star steel," and so on that day we telegraphed to Col. Hoyt as follows: "—— —— —— ready contract large quantity spring steel. Can you go to Canton, and when? Answer." So that Col. Hoyt's statement *was* a fact as you supposed.

Sometime after the 7th of March we found that we were making more Star steel than we had expected, so we naturally sought a market for the extra quantity, and it was, of course, necessary for us in doing this to accept the market price. It was certainly no fault of ours that this price was lower than that at which we had taken your order. We should have been only too happy to have got a higher price than 5⅜c. if we could have done so, but this was impossible.

We recognized the disadvantage under which you were laboring, and we made you a voluntary reduction of ¼c. per

pound on 100 tons, in order to partially help you out, but we did not understand that the bargain was such as you describe it, and that we were bound to give you the benefit of any lower prices which we might be obliged to accept. If this was the bargain, we do not see that you need to have hestitated very much in buying the steel, for if the price had advanced we presume that you would have expected us to deliver the full quantity at the contract price, while as it declined you consider that you were not bound to take the whole 300 tons. We recognize, however, that there may be perfectly honest differences of opinion in matters of this kind, and we, of course, do not doubt for a moment that you made the contract under the impressions which you now state, and whatever our view of the case may be we want to satisfy you. With this end in view, we will state that the average price of our sales of Star steel during the year 1876 after March 7th was 5.46 cents per pound, and the lowest price which we took during that time was 5c. delivered at our works, cash in 10 days. If it will meet your wishes, we will complete your contract at this latter price, the lowest at which we sold during the year 1876. Awaiting your reply, we are

Yours very truly,

NAYLOR & CO.

EXHIBIT "B."

W. A. H. JR.

NAYLOR & CO., NORWAY IRON WORKS.

6 OLIVER STREET,
BOSTON, March 7th, 1877.

MESSRS. GEO. COOPER & CO.,
Cleveland, Ohio, —

Dear Sirs: We are in receipt of your favor of the 5th inst., but as the four tons of steel had already gone forward before your letter reached us, the cancelment comes too late. In regard to your contract, we think that you must be under a misapprehension in saying that you have more than filled your contract for 1876.

We annex a mem. of the deliveries against your order, showing a total of —— tons.....255 18 3 1
including the four tons just sent, so there are
still due you @ 5½c. 44 1 0 27

to complete the order for —— tons.....300 0 0 0

If Col. Hoyt has made any arrangement with you, by which any portion of this should be cancelled, we have not been advised of the same.

We are, dear sirs, yours very truly,
NAYLOR & CO.

Mems. of deliveries of Star spring steel against Messrs. Geo. Cooper Co.'s order of March 7th, 1876, for 300 tons.

			Tons.			
May	12,	1876,.....	8	8	0	3
"	23,	"	10	8	0	22
"	26,	"	11	15	3	25

			Tons.			
June	1,	"	11	18	1	0
"	5,	"	7	8	3	15
"	30,	"	10	9	31	27
July	17,	"	10	8	1	6
"	18,	"	10	6	3	15
Aug.	28,	"	11	16	0	20
"	30,	"	10	17	3	26
Sept.	13,	"	10	8	1	10
"	27,	"	20	9	2	6
Nov.	4,	"	10	5	3	19
"	11,	"	24	12	0	12
"	13,	"	8	3	2	11
"	14,	"	66	0	1	27
Dec.	15,	"	7	18	3	9
March	6,	1877,	4	1	3	0
			255	18	3	1

Contracts fol. 30 A. C. H.

EXHIBIT "C."

W. A. H. JR.

CLEVELAND, March 7th, 1876.

MESSRS. NAYLOR & Co., Boston.

Gents:

Please enter my order for 300 tons Star spring steel—@ 5⅝c. per lb., currency. Sixty days delivered, Boston—10-20 tons Swedish spring steel (or all we use this year) at 7¾c. per lb., currency. Terms as above.

The steel is to be made in accordance with specifications

of sizes to be furnished by us, and is to be all taken by January 1st next.

To enable us to avail ourselves of low freights during summer months, you are to ship us (on our giving you specification of sizes) the whole 300 tons, or as much of it as you can, before close of navigation this fall, and you are to invoice, and we agree to settle for above quantity on above basis, as to price and terms, at the rate of at least forty-three (43) tons per month, beginning June 1st prox.

All steel not invoiced but in our hands, is to be held by us as your property, and insured by us for your account, and to be free of storage to you.

Yours very truly,

GEORGE COOPER & Co.

Accepted:

(Signed.) NAYLOR & Co.,
THOS. J. HOYT.

H.

EXHIBIT "D."

W. A. H. JR.

Copy of Correspondence.

From GEO. COOPER & Co.,
Dated, Cleveland, O., Mch. 5, 1877.

MESSRS. NAYLOR & Co., BOSTON.

Gentlemen:—Cancel our order of 1st inst. for four tons Star spring steel.

We want no more at 5½ c. per lb.

We have already more than filled our contract for 1876.

Yours very truly,

(Signed) GEO. COOPER & Co.

Geo. Cooper et al., Plaintiffs, vs. B. Schlesinger et al., Defendants.

EXHIBIT "E."

W. A. H. JR.

Copy of Correspondence.

From GEO. COOPER & Co.,

Dated, Cleveland, O., Oct. 16th, 1876.

MESSRS. NAYLOR & Co., BOSTON.

GENTLEMEN:—

Your two favors of the 12th Sept. and Oct. respectively, came duly to hand. In your Sept. letter you say that Col. Hoyt was not at home, and that you could not give a satisfactory reply. We have allowed time to pass in order for you to have an interview with him in relation to this matter. We will now lay before you our case, and will, in the first place, say we have in no way changed our views since we first laid our case before Col. Hoyt. Permit us then to go back to the contract we had with you dated Nov. 10, 1875. We contracted then with a view of commencing to run your Star steel on Jan. 1st, 1876; this was all satisfactory.

Sometime in Feb., '76, Col. Hoyt called at our store and enquired how the steel was working, &c. We answered "all right." We also said "that if the price should be satisfactory we would continue to run the steel through the year." He said he would, upon his own authority, say that the price should be no higher.

On or about the 6th of March, 1876, he called upon us and said you had but 600 tons of steel for sale, and that 300 tons was all that he could or would sell to spring makers, you wishing to retain the other 300 tons for some other branch of trade. We were in no want of steel. You

will readily see from your books that we had then due on contract of Nov. 10, 1875, not less than 150 tons, perhaps 175 tons, enough to keep our works running fully 3 mos. and we hesitated in even entertaining the idea of buying at an advance in price, and so long in advance of our wants, but he persisted in pressing the sale, by stating if this chance was lost we could not get another pound of Star steel during the balance of the year 1876.

You, perhaps, know something of the difficulty of changing from one make of steel to another. Col. Hoyt finally prevailed upon us to entertain the thought of a contract, he at the same time assuring us that another party wanted the steel and was ready to take it at 5¾c. per lb.; he referred to a concern in Canton, O., and was on the point of starting for that place (so he said). Believing the statements made by Col. Hoyt to be facts, we concluded to buy the steel, although it was, with what we had due on contract of Nov. 10, '75, more than we wanted, yet we took the lot, supposing that we had made a clean purchase of all the "Star" steel that would be offered by you during the year 1876. We supposed that if it was more than our requirements that there would be no trouble of placing 50 or 100 tons at contract price, when you were not making any and we had all in the market. We faithfully carried out our part of the contract nearly to its full completion before we were fully made aware of the fact that you continued after March 7th, and during the whole of the year, to make and put upon the market the same "Star" steel, notwithstanding Col. Hoyt had assured us that 300 tons would comprise all that could be offered by you, and that

you sold the steel in lots of various quantities, and at less price than we paid you.

What we claim, and it must appear to you to be just, that when you concluded to continue the manuf'g of and sale of the "Star" steel you should have at once notified us and released us from the contract; if the contract had not been obtained, and it could not have been had not the representations referred to been made, we could, no doubt, have bought it from you for considerably less and in such quantities as we required. We feel that a very great injustice has been done us.

Hoping to receive a satisfactory reply, we remain—

Yours very truly,

(Signed) GEO. COOPER & Co.

EXHIBIT "P."

OFFICE OF GEO. COOPER & Co.,

CLEVELAND, O., Nov. 1st, 1876.

MESSRS. NAYLOR & Co., BOSTON:

GENTS:—

We understand you are selling Star spring steel for less than you are charging us. We think we are fairly entitled to your best figures. *What do you say?*

Yours,

GEO. COOPER & Co.

CONTINUANCE.

And afterwards, to-wit: at the January term of said court, A. D. 1880, this cause was continued to the next term of said court.

And afterwards, to-wit: at the April term of said court, A. D. 1880, this cause was continued to the next term of said court.

And afterwards, to-wit: at the October term of said court, A. D. 1880, this cause was continued to the next term of said court.

And afterwards, to-wit: at the January term of said court, A. D. 1881, this cause was continued to the next term of said court.

JUDGMENT.

BARTHOLD SCHLESINGER ET AL.
vs.
GEO. COOPER ET AL.

And afterwards, to-wit: on the 20th day of May, A. D. 1881, being a day of the April term of said court, the following proceedings were had in this cause, to-wit:

This cause came on for hearing upon the defendants' motion for a new trial in this cause, which motion was, upon consideration by the Court, overruled.

It is, therefore, considered by the Court that said plaintiffs recover against said defendants said sum of six hundred and sixty-seven dollars and twenty-seven cents ($667.27) so found due them by the jury, as aforesaid, and the further sum of fifty dollars and four cents ($50.04), the

interest on said sum of $667.27 from the 6th day of January, A. D. 1880 (being the first day of the said Januay term, A. D. 1880), to the first day of this term of this court, making in all the sum of seven hundred seventeen dollars and thirty-one cents ($717.31), together with their costs herein expended to be taxed, for which it is ordered that execution issue. To all of which holding and ruling by the Court the defendants, by their attorneys, except, and tender their bill of exceptions, as heretofore allowed, signed and sealed, and the same, it is hereby ordered, shall be made part of the record in this case.

UNITED STATES OF AMERICA,
Northern District of Ohio, ss.

I, Augustus J. Ricks, Clerk of the Circuit Court of the United States for said District, do hereby certify the above and foregoing to be a true, correct and complete transcript of the record of all the proceedings had in said court in the cause wherein Barthold Schlesinger, Theodore Drier and Sebastian B. Schlesinger are the plaintiffs and George Cooper and Cassius M. Clark are the defendants, as the same appears from the files and records of said court now remaining in my custody.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at my office in Cleveland, in said District, this 3d day of June, A. D. 1881, and in the 105th year of the independence of the United States of America.

[SEAL.] AUGUSTUS J. RICKS, *Clerk.*

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SUPREME COURT OF THE UNITED STATES.

October Term, 1883.

GEORGE COOPER ET AL.,
Plaintiffs in Error,

vs.

BARTHOLD SCHLESINGER ET AL.,
Defendants in Error.

No. 262.

Brief in Behalf of the Plaintiffs in Error.

ALBERT G. RIDDLE.
HENRY E. DAVIS,
For Plaintiffs in Error.

R. O. POLKINHORN, PRINTER, WASHINGTON, D. C.

SUPREME COURT OF THE UNITED STATES.

October Term, 1883.

GEORGE COOPER ET AL.,
Plaintiffs in Error,

vs.

BARTHOLD SCHLESINGER ET AL.,
Defendants in Error.

No. 262.

Brief in Behalf of the Plaintiffs in Error.

I.

STATEMENT OF THE CASE.

In 1876 the plaintiffs in error, Cooper & Co., were, and for ten years had been, engaged at Cleveland, Ohio, in the manufacture of carriage springs, and for nine years of that time had been dealing with the defendants in error, (Rec,, pp. 19, 20), who, under the firm-name of Naylor & Co., (p. 5), were manufacturers of steel and dealers in Norway iron, at Boston, Mass. (p. 20.) Cooper & Co.'s purchases from Naylor & Co. were made principally through one Hoyt, (p. 21), an agent and representative of the latter firm, (pp. 46, 48, 86.)

On March 7th, 1876, Hoyt, in behalf of the defendants in error, called upon the plaintiffs in error for the purpose

of making a sale to them of "Star" steel, manufactured by the defendants in error, and the sort then used by the plaintiffs in error: the process of making which was peculiar, and to change from which would involve much expense, (pp. 26–7, 31, 36–40.) At that interview Hoyt said: "We have six hundred ton, but there is three hundred ton of that steel that has got to be reserved for other business outside of spring makers; three hundred ton only can go into the hands of spring makers," (pp 23, 33, 37, 54,); and, further, that the defendants in error were going into making another kind of steel, known as "Seaman and Martin," and wanted the room then occupied by the furnaces in which the "Star" steel was made: which furnaces would have to be and would be taken down in order that the "Seaman and Martin" furnaces might be put up in their place, (pp. 44, 60, 62.) This taking down the "Star" steel furnaces would, he said, lessen the production of that sort so much that the defendants in error would have only six hundred tons left for sale during the rest of the year, (p. 60.)

He was informed that the plaintiffs in error did not want the steel; that they already had a contract with his house for steel enough to run their factory until July 1st; but to this he replied: "After that you will want the steel, and if you don't get it now, you can't get it at all—not a pound." (pp. 23, 54–7.)

Later in the same day, Hoyt returned to the office of the plaintiffs in error, and said: "I am going to Canton. There is a party there that will close this steel for me at once. Now, if you want it there is a chance, and your only chance;" and he added: "I would prefer your account to the account at Canton." (pp. 24, 33.)

Thereupon Hoyt drew up an order for the three hundred tons of steel, at 5⅞ cents per pound, which the plaintiffs in error, supposing the facts to be just as Hoyt represented

them, signed, and Hoyt, for the defendants in error, accepted. (pp. 24, 95–6.)

During the year 1876, the steel market was falling all the time (pp. 26, 88), the market-price at the end of the year being $3\frac{3}{4}$ cents. (p. 34.)

The defendants in error had at the time, seven or eight "Star" furnaces (p. 84), and of these but two were taken down in 1876 (p. 86); but even those were replaced, and the production of "Star" steel increased, because orders came in so rapidly (p. 62); and the manufacture of that steel was continued up to about July, 1879. (p. 83.)

At the time of the interview between Hoyt and the plaintiffs in error, Hoyt's headquarters were in New York, and, as he admits, he "was therefore not very well posted in regard to the business at the mill," which was at Boston (p. 45); and the defendants in error, in fact, expected to make more of the "Star" steel than they then had on hand and in process of manufacture. (p. 90.)

Between March 7th and the end of the year 1876, they manufactured and delivered, almost exclusively to carriage-spring makers, seven or eight hundred tons in addition to the quantity sold the plaintiffs in error, and in addition to five hundred tons for which they had taken orders prior to March 7, (pp. 84–5, 88–90): that is to say, from twelve to thirteen hundred tons, instead of three hundred, the quantity stated by Hoyt to be sold, exclusive of the order of the plaintiffs in error. These sales were made at prices lower that $5\frac{5}{8}$ cents per pound, running as low as 5 cents on ten days time. (pp. 84–5, 92–3.)

The plaintiffs in error received a large part of the steel ordered by them, about two hundred and fifty-five tons, (pp.

28, 95), and paid for all received except the last invoice (p. 25). For the value of the last invoice, less a certain credit, the defendants in error brought this action in the United States Circuit Court at Cleveland, claiming $570.76 and interest. (pp. 5–6.) Conformably to the Ohio practice, the plaintiffs in error, thereupon set up a counter claim for $6000 damages, by reason of the false and fraudulent representations and wrongful conduct of the defendants in error in the premises. (pp. 10–14.)

The verdict and judgment were for the defendants in error in the sum of $717.31 and costs. (pp. 100–1.)

II.

Assignments of Error.

The errors claimed in the action of the court below were committed in the charge to the jury, as follow:

1. The instruction that to sustain their counter-claim the plaintiffs in error must have shown, (*a*) that the representations made by Hoyt were false at the time they were made, (*b*) that he knew them to be false at the time they were made, and (*c*) that they were intended to deceive and made with such fraudulent intent; and that all of these elements were necessary to the maintenance by the plaintiffs in error of their counter-claim. (pp. 73–7.)

2. The instruction that the measure of damages to the plaintiffs in error was the difference between the agreed price that was procured by the fraudulent representations, and the market price of the articles purchased at the time when the sale was made, and whatever reduction in the market price was occasioned by the placing by the defendants in error on the market of more steel than was promised so to be placed. (pp. 78–9.)

III.

Argument.

1. The court erroneously defined the elements necessary to support the case of the plaintiffs in error.

a. It is not necessary that a party making false representations should know them to be false at the time of making.

> "When a representation in a matter of business is made by one man to another calculated to induce him to adapt his conduct to it, it is perfectly immaterial whether the representation is made knowing it to be untrue, or whether it is made believing it to be true, if, in fact, it was untrue."
>
> *Williamson* v. *Allison*, 2 East., 446;
> *Leather* v. *Simpson*, L. R. Eq., 398, 406.

Although the latter was an equity case, it correctly states the rule even in cases at law; especially where, as in Ohio, the distinction between law and equity no longer obtains.

The following cases, taken indifferently from the law and equity reports, support the proposition in its extent; and some of them will be found especially in point, as they arose under codes similar to that of Ohio:

Frenzel vs. *Miller*, 37 Ind., 1, p. 17;
Litchfield vs. *Hutchinson*, 117 Mass., 195;
Sharp vs. *Mayor*, 40 Barb. (N. Y.,) 256, p. 269;
Smith vs. *Richards*, 13 Pet. 26, pp. 36–7;
Smith vs. *Babcock*, 2 Woodb. & M., 246;
Harding vs. *Randall*, 15 Me., 332;
Hazard vs, *Irwin*, 19 Pick., 95, pp. 108–9;
Craig vs. *Ward*, 36 Barb., (N. Y.,) 377, p. 385;
Bankhead vs. *Alloway*, 6 Cold., (Tenn.,) 56;
Fisher vs. *Mellen*, 103 Mass., 503;
Wilcox vs. *Iowa Univ.*, 32 Iowa, 367;
Graves vs. *Lebanon Bank*, 10 Bush., (Ky.,) 23;
Foard vs. *McComb*, 12 Bush., (Ky.,) 723.

And the subject has been fully gone into and elucidated in a recent work, in a manner not admitting of improvement:

> "The question is, what known circumstances are enough to throw the risk of a statement upon him who makes it, if it induces another man to act, and it turns out to be untrue. * * *
>
> "It is enough, in general, if a representation is made recklessly, without knowing whether it is true or false. Now, what does 'recklessly' mean? It does not mean actual personal indifference to the truth of the statement. It means only that the *data* for the statement were so far insufficient that a prudent man could not have made it without leading to the inference that he was indifferent. That is to say, * it means that the law, applying a general objective standard, determines that, if a man makes his statement on those *data*, he is liable, whatever was the state of his mind, and although he individually may have been perfectly free from wickedness in making it."
>
> Holmes, Com. Law, 135–6.

b. And "with regard to the intent, * the law goes no farther than to require proof either of the intent, or that the other party was justified in inferring such intention. So that the whole meaning of the requirement is, that the natural and manifest tendency of the representation, under the known circumstances, must have been to induce the opinion that it was made with a view to action, and so to induce action on the faith of it." Id., 134.

> "The elements of deceit which throw the risk of his conduct on a party are these: First, making a statement purporting to be serious; second, the known presence of another within hearing; third, known facts sufficient to warrant the expectation or suggest the possibility that the other party will act on the statement; * fourth, the falsehood of the statement. This must be known, or else the known evidence concerning the matter of the statement must be such as would not warrant belief according to the ordinary course of human experience." Id., 137–8.

In short, the purpose of the law is to secure a man indemnity against certain forms of harm at the hands of others, not because they are wrongs, but because they are harms; and it is for harms, when fairly avoidable, and not for wrongs, that the law holds parties liable.

2. The court erred in prescribing the measure of the damages to the plaintiffs in error.

In case of false representations the measure of damages is not merely the difference between a price paid and market value. The true rule is variously stated, but in all cases to substantially the same effect.

> "In case of fraud it is held that the wrong doer must answer for those results injurious to another party, which must be presumed to have been within his contemplation at the time of the commission of the fraud."
>
> Field on Dam., Sec. 707.
>
> *Crater* vs. *Binninger*, 33 N. J. L., 513.

> "In case of illegal or mischievous conduct, the disposition of the court is to make the party in the wrong liable for injurious consequences flowing from the illegal act although they be very remote."
>
> Sedgwick on Dams., pp. 88–9;
>
> Sutherland on Dams., p. 160.

And so it has been repeatedly held that in such cases the injured party, must recover all loss and damage occasioned by the wrongful act; for, with reference to that act all resulting damage is logically proximate, in the direct relation of effect to cause.

> *Masterton* vs. *Mayor*, 7 Hill, N. Y. 61, opinion of Nelson, Ch. J., pp. 67–73, cited in *Abbott* vs. *Gatch*, 13 Md., 314, at p. 334, as having received the sanction of the text-writers, &c.
>
> *Passenger* vs. *Thorburn*, 34 N. Y., 634;

Milburn vs. *Belloin*, 39 N. Y., 53;
Booth vs. *Mill Co.*, 60 N. Y., 487;
Thompson vs. *Burgey*, 36 Pa. St., 403;
Cline vs. *Myers*, 64 Ind., 304.

And in the case of a fraudulent representation as to the value of an article sold the damages are measured, not by the difference between the real value and the amount paid, but by the difference between the real value and what the value would have been if the article were in fact as represented.

Murray vs. *Jennings*, 42 Conn., 9;
Thompson vs. *Burgey*, *ubi supra*;
Stetson vs. *Croskey*, 52 Pa. St., 230;
Nye vs. *Iowa City Works*, 51 Iowa, 129;
White vs. *Smith*. 54 Iowa, 233;
Mason vs. *Raplee*, 66 Barb., 180;
Drew vs. *Beall*, 62 Ill., 164;
Cline vs. *Myers*, *ubi supra*;
Page vs. *Wells*, 37 Mich., 415;
Morse vs. *Hutchins*, 102 Mass., 439.

Or, as the rule is sometimes stated, the measure of damages in cases of contract involving false or fraudulent representation is, the value which would have enured to the injured party had the contract been carried out as expected by him: in other words, the value to him of the contract.

Morris vs. *Parham*, 4 Phil., 62;
Morrison vs. *Lovejoy*, 6 Minn., 319;
Clifford vs. *Richardson*, 18 Vt., 620;
Moorehead vs. *Hyde*, 38 Iowa, 382.

In the case at bar there was an actual loss to the plaintiffs in error, represented by the difference between the price paid by them and the real market value of the various quantities of steel, not at the date of the contract but, at the

respective dates of delivery; and, in addition to this, the further loss represented by what the steel would have been worth to them had the defendants in error put upon the market only the three hundred tons as promised, instead of the twelve or thirteen hundred tons actually put out by them; in other words, the loss of what profit would have resulted to the plaintiffs in error from a practical monopoly of the "Star" steel for the purposes of spring makers.

The case for the plaintiffs in error may be summarized thus:

Hoyt, who was in a position to know, with reasonable diligence, the exact state of things, made to the plaintiffs in error, who were not in a position to know the exact state of things and were not put upon inquiry by anything in the premises, representations untrue in fact and unjustified in expectation.

By those representations, upon which they relied, the plaintiffs in error were invited and persuaded into a contract, in advance of their needs, into which, but for those representations, they would not have entered. As a consequence of that contract the plaintiffs in error suffered loss, of which the falsity of the representations was the cause.

The elements of that loss are clearly ascertainable. (1.) By reason of their contract obligation, the plaintiffs in error were compelled to pay, at certain periods, a greater price than that prevailing in the market. (2.) By reason of their contract they were effectually prevented from going into the open market and buying, according to their needs, at the ruling price. This manifestly caused them damage, to be measured by the actual loss sustained, no matter by what or how many influences occasioned.

(3) By reason of their contract, based upon and induced by the representations, they would, if the facts had corresponded to the representations, have had control of the mar-

ket of "Star" steel for the use of springmakers; and they bought in advance of their needs almost, if not quite, solely on this consideration: relying on what must have seemed the certainty of disposing at a profit of whatever quantity they might not actually need. The falsity of the representations and the non-compliance by the defendants in error with the expectations held out by them, wholly destroyed the value to the plaintiffs in error of the contract in this particular.

The harm occasioned the plaintiffs in error by the instructions of the court below, would seem to be manifest. Not only was it exacted of them that they should establish actual knowledge of the falsity of the representations and actual fraudulent intent in the making them; but also, they were denied the right to recover anything more than the difference between the agreed price and the market value at the time of agreement, with such problematical addition to this difference as might have been occasioned by the action of the defendants in error in placing on the market more steel than promised: an instruction equally misleading to the jury and erroneous in point of law.

ALBERT G. RIDDLE,
HENRY E. DAVIS,
For Plaintiffs in Error.

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SUPREME COURT OF THE UNITED STATES.

GEORGE COOPER ET AL.,

Plaintiffs in Error,

vs.

BARTHOLD SCHLESINGER ET AL.,

Defendants in Error.

No. 262.

BRIEF FOR DEFENDANTS IN ERROR.

H. L. TERRELL,

Attorney for Defendants.

Evening Post Job Printing Office, N. Y.

Supreme Court of the United States.

GEORGE COOPER ET AL.,
Pltffs. in Error,

vs.

BARTHOLD SCHLESINGER ET AL.,
Defts. in Error.

No. 262.

Brief for Defendants in Error.

May it please your Honors:

The only error assigned by counsel for plaintiffs in error is in the charge of the court in reference to the measure of damages.

Before we consider the charge, it is necessary to correct a very serious mistake into which opposing counsel has fallen in his argument.

He says, on page 8 of his brief, that "defendants' attorneys asked the court to charge the jury to the effect that "if it could be fairly inferred from the evidence that the "prices of steel for the rest of the year 1876 would naturally, in the course of business, be less than they were at "the making of this contract, and in order to secure to "themselves this advantage, and put the burden on defendants, the plaintiffs made the false representations complained of, and defendants, relying on the same, were

" thereby induced to enter into this contract, and had thus " been made to pay higher prices for their steel than in the " natural and ordinary course of their business, and but for " this contract they would have paid; for such loss, de- " fendants would have a right of action, and should be al- " lowed such loss as the testimony shows them to have sus- " tained."

The transcript of the record discloses no such request. In fact, neither this nor any other request for a charge was made.

What really was claimed by the attorneys for the defendants below, on the question of the measure of damages, appears in the charge of the court, on page 17 of the record, viz.;

" It is claimed on behalf of the defendants who set up this " cause of action against the plaintiffs, that their measure is " the reduced market price of the steel before and at the " time of the delivery of the respective quantities of steel " that were to be delivered by the terms of the contract."

The case was, that plaintiffs sued the defendants for the price of certain steel sold and delivered. The defendants admitted the sale and delivery, but set up in a double-barrelled counterclaim, under the State practice, a claim for damages by reason (first barrel) of certain alleged false representations as to the quantity of steel plaintiffs *could* make during the season of 1876, which representation, defendants alleged, induced the purchase, and also by reason (second barrel) of the breach by the plaintiffs of a promise they made as to the quantity of steel they *would* make and sell during that season.

Notwithstanding the allegation of the counterclaim that the agreed price of the steel was in excess of its market value at the time of the transaction, the defendants on the trial admitted the contrary to be the fact, and their counsel, in his argument filed in this court, keeps good the admission.

The contract price was $5\frac{5}{8}$ cents per lb. (See answer, Record, p. 10.)

The market price at same date was $5\frac{5}{8}$ cents per lb. for the kind of steel sold. (See testimony of defendant C. M. Clark, Record, p. 35.)

"Q. You say at that time in March, Cassius, that the market "price of steel was about five and a half; do you mean by "that ordinary Seaman & Martin's steel?

"A. Yes.

"Q. And you put this one-eighth of a cent higher, mak- "ing it five and five-eighths, being the market price at the "time of the contract?

"A. Yes."

But the steel was to be delivered in the future, as manufactured, and the answer alleges that at the time of the deliveries the market price was much less than the contract price. Upon this point there was no contention, the proof showing, without attempt to contradict it, that such was the fact.

The alleged representation which defendants claimed induced the purchase was, in substance, that plaintiffs would only have six hundred tons of this steel for sale during that season, whereas it turned out that they manufactured and sold a much larger quantity.

The defendants' attorneys, at the time they prepared the answer in the case, evidently had no idea that the defendants could hold the plaintiffs liable for a shrinkage in value arising from general causes entirely outside the alleged over-production and sale of steel by the plaintiffs.

On the contrary, they allege in their counterclaim as follows:

"And defendants further say that it was a part of the "agreement and contract aforesaid, and said plaintiffs then "and there promised and agreed with defendants that they "would not manufacture and sell during the year 1876, "exclusively of the amount already ordered by plaintiffs' "customers, more than 600 tons of said steel, including "the amount so contracted to be sold to said defendants, "and would not manufacture and sell during the year 1876, "exclusively of the amounts already ordered by plaintiffs' "customers, any Star Spring Steel whatever to makers of "carriage springs." (See Record, pp. 11, 12.)

Then, coming to the allegation of the counterclaim in respect to their damages, it reads:

"*Defendants further say that by reason of the manufacture* "*and sale to other persons, and to other makers of carriage*

" *springs, of large quantities of said Star Spring Steel, the* " *market price of the same, and of carriage springs, was largely* " *decreased, and during said year* 1876 *said defendants were* " *compelled to, and did pay for all the steel delivered to them* " *under said contract as aforesaid, a price greater than the* " *market price,* and a price greater than the said steel was " sold for by plaintiffs to others, and to other makers of " carriage springs, and defendants were unable to compete " with other makers of carriage springs, to the damage of " defendants in the sum of six thousand dollars; defendants " further say that they did not learn the true condition of " plaintiffs' furnaces or business, or of the sales aforesaid to " other persons, and to other makers of carriage springs, " until after the delivery of the steel mentioned in petition, " and that these defendants refused to receive any further " or other steel under said contract." (See Record, pp. 13, 14.)

In short, the pleadings were made up and the case was tried upon the theory that the plaintiffs represented that they *could* not, and agreed that they *would* not, put upon the market more than a certain quantity of steel in the season of 1876; that, in the face of such representation and agreement, they went forward and put upon the market quantities of steel largely in excess of such amount; *and that, by reason of their putting on the market such excess, the value of the steel was largely lessened, to the damage of the defendants.*

Having reference, therefore, to the case as it was actually made up and tried, the charge of the court was beyond criticism, as far as relates to the measure of damages.

The court charged the general rule as follows:

" And it is made the duty of the court to give you the " rule as to the measure of damages between the conten- " tions of these parties, as the true rule that the law lays " down for that purpose. I direct you upon that subject " that the general rule for an action of that kind, and for a " fraud of that kind, would be the difference between the " agreed price that was procured by fraudulent representa- " tions and the market price of the article purchased at the " time when the sale was made." * * * *

Then, to meet the phase of the case pressed by defendants' counsel, the court further charged as follows:

"It is said that the representation was that these parties "had but three hundred tons of steel to be put upon the "market during the year for the purpose of being manu- "factured into springs, and that they had but six hundred "tons of steel to be put upon the market during the whole "year for all purposes. Now, I direct you that if this "representation was false, and these parties did go and "place upon the market greater quantities of steel than "they said in their representations they had, then, to what- "ever extent the placing of that quantity of steel upon the "market would have reduced the market price of steel, the "defendants in this action would be entitled to recover. "But they would not be entitled to recover a reduction in "the price and the value of steel occasioned by other things "over which the plaintiffs in this suit had no control, and "not growing out of the fact that these plaintiffs did, con- "trary to the representations and statements of this agent, "place upon the market a greater quantity of steel."

This charge of the court was favorable to and sustained, in every respect, the defendants' theory of the case.

The last clause, however, went farther, and negatived defendants' right to recover damages occasioned by outside causes with which plaintiffs had no connection; but, in so doing, it did not deny the right of the defendants to any damages which their case, as made, contemplated.

Moreover, the charge was right. If A. induces B., by false and fraudulent representations, to purchase a chattel, and the chattel is worth in the open market all that B. gives for it, what damage does B. suffer? The general rule laid down by the court was clearly correct and in point.

As to the other branch of the charge, it was only on the allegation of the counterclaim that the plaintiffs agreed not to sell more than the specified quantity of steel, that the evidence showing greater sales was competent at all. For this breach of agreement, the measure of damages clearly was the deterioration in price *caused by* the breach—that is, by the sale of the excess over the agreed amount. Deterioration in price, caused by circumstances entirely independent and outside of the breach of contract, or false representation, complained of, forms no part of recoverable damages.

We have no quarrel with any of the authorities quoted at

length in the opposing brief. The trouble is not with them, but with counsel who has entirely misconceived their force. These authorities hold simply that a recovery in such case may include whatever damages may fairly be considered to have been *the natural consequence of the breach or fraud*, and which must be presumed to have been *within the contemplation of the wrongdoer* at the time. *Damages consequent upon the breach or fraud* complained of are recoverable, not damage consequent upon independent causes. If Green's cow, in the case put, had been warranted free of *mouth* disease only, and being put with other cows, had communicated to them both *mouth* and *hoof* disease, the damage arising from the *hoof* disease would not have been *consequent* upon the breach of warranty, and hence, would not have been recoverable. So, also, if Levy's gun had been warranted safe and secure as to its *locks*, and subsequently the barrel exploded from some defect in it, the injury caused thereby would not have resulted from or been consequent upon the breach of the warranty, no matter how defective the locks may have been, and there could have been no recovery.

Opposing counsel seem to have the idea that once establish a false representation, or a breach of a warranty, in the sale of a cow, and you may recover from the wrongdoer whatever losses an adverse fate may visit upon you in connection with the animal, no matter whether consequent upon the wrong or not. If Smith represents or warrants his horse as free from poll-evil when he sells him to Jones, and it turns out that the horse was not so free at the time, then if the horse dies from glanders or lock-jaw, Jones may recover for the death of the horse.

Such a doctrine is utterly devoid of reason, and has no place in the law. If you warrant against *hoof* disease (to keep up the illustration used by our adversary) and the animal has *hoof* disease, you must pay the damages consequent upon *hoof* disease, not those consequent upon something else.

So, if Smith represents that he cannot, or promises that he will not sell or throw upon the market more than 600 tons of steel in a season, and he throws upon the market 1,600 tons of steel, whatever damage he causes by selling the 1,000 tons excess, he must pay. This is precisely what the court charged in this case. If, however, Jones, a stranger

to Smith, at the same time floods the market with 100,000 tons of steel and demoralizes prices thereby, neither law nor justice requires Smith to pay the damage caused by the act of Jones. Such damage is not *consequent* upon the act of Smith, and he cannot be made responsible for it. This, again, is precisely what the court charged.

A very slight examination of the record would disclose to this court the fact that the charge of the court below was not what hurt the defendants.

What was said about the quantity of steel the plaintiffs would have for sale during that season was evidently said in perfect good faith, and the excess that they sold over what they estimated from the condition of their furnaces they would be able to sell, was comparatively small in quantity, and it had no great effect upon the price, but, whatever effect it had, the court instructed the jury to take into account in estimating defendants' damages in case they found for the defendants on their counterclaim.

It was perfectly plain to the jury that the whole defense was an attempt by the defendants to saddle upon the plaintiffs the losses resulting from a declining market, and although the case was tried to a jury of defendants' neighbors, the plaintiffs being foreigners and compelled to rely solely upon the evidence of their agent, Hoyt, also a foreigner, against Cooper, Clark, and Gillette, the jury's innate sense of fair play and honest dealing compelled them to the verdict they rendered.

We have said this much to give the court something of the atmosphere of the trial, because the surroundings sometimes aid a reviewing court in its examination of errors.

We are now prepared to satisfactorily establish, we think, that the jury never got to the question of damages at all, as far as defendants' counterclaim was concerned.

The plaintiffs sued for $570.56, with interest from March 5, 1877. The case was tried at the January Term, 1880, of the Circuit Court, which opened January 2, 1880.

$570.56, with interest at 6 %, computed from March 5,

1877, to January 2, 1880, the first day of the term, amounts to $667.27, the precise amount of the verdict. (See Record, p. 17.)

This shows that the the jury took no account of defendants' counterclaim, but found against it.

But we need not stop here. The court charged the jury as follows, as to their finding:

" Now, with that rule, take the evidence, and it is for you " to say how much these defendants, if they have made out " their suit, are entitled to recover in this action, and what- " ever amount you may find in favor of the plaintiffs on this " branch of the case will be taken from the amount that the " defendants are entitled to recover, and your verdict would " be for the balance in favor of the defendants, if their dam- " ages should exceed the amount of the plaintiffs' claim. *If,* " *however, the defendants' case is not made out, then your duty* " *will be to return a verdict in favor of the plaintiffs for the* " *amount of the steel that is charged in the account.*

Under this charge the jury cast no balances as instructed in the first clause, but finding "the defendants' case not made out," in pursuance of the direction contained in the last clause, they brought in a verdict for the plaintiffs in the full amount claimed.

Lastly, the verdict itself shows upon its face that the jury found against the defendants on their counterclaim.

" This day came again the parties, by their respective at- " torneys, and also the jury heretofore empanelled and " sworn, and affirmed herein, and said jury for verdict say: " ' We, the jury in this case, being duly empanelled and " ' sworn, *do find for the plaintiffs*, and assess their damages " ' to the sum of six hundred and sixty-seven and $\frac{27}{100}$ dol- " ' lars ' " (See Record. p 17).

Upon all the issues joined, as well upon the counterclaim as upon the original claim, this is an express finding by the jury in favor of the plaintiffs.

The jury having settled that there were no false and fraudulent representations, and that there was no contract

of warranty, what would have been a proper charge as to the measure of damages in the case had the defendants' counterclaim been made out becomes a pure abstraction, to which we have no desire to devote further time.

Respectfully submitted,

H. L. TERRELL.